Public Utilities FORTNIGHTLY

February 21, 1929

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

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UNION METAL
DISTRIBUTION AND TRANSMISSION POLES
III

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Public Utilities Fortnightly

VOLUME III

February 21, 1929

NUMBER

PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

PUBLIC UTILITIES FORTNIGHTLY; a magazine dealing with the problems of utility regulation and allied topics, including the official decisions of the State Commissions and courts; endorsed by the National Associations of the Utility Industry and by the National Association of Railroad and Utilities Commissioners, and supported in part by those conducting public utility service, manufacturers, bankers, accountants and other users of the publication. Published every other Thursday; 75 cents a copy; $15.00 a year; with bound volumes and Annual Digest, $32.50 a year. Editorial and advertising office, Munsey Building, Washington, D. C., circulation office, Duffy-Powers Building, Rochester, N. Y. Entered as second-class matter April 29, 1915, at the Post Office at Rochester, N. Y., under the Act of March 3, 1879.

Pages with the Editor

ON January 16th, just as the last issue of PUBLIC UTILITIES FORTNIGHTLY was going to press we had the privilege of appearing before the Federal Trade Commission in Washington. (In this case the editorial "we" is really justified, as it included two of us.) The report of the Editor's conference with the gentlemen of the Commission on that interesting occasion may now be found in Uncle Sam's archives.

* *

THE experience was illuminating to both the gentlemen of the Commission as well as to the Editor.

* *

IF at times the nature of the proceedings partook a bit of an inquisitional flavor, one must remember, after all, that the investigation was instituted for the purpose of delving into the business practices of public utility companies in general, and of unearthing their reputed improper practices specifically. Especially the utility companies' methods of conducting their "propaganda" through the press.

* *

WHEN a sleuth is hired to enter a house to capture a burglar who is reported to be hiding there, it is but natural for that sleuth to assume that there really is a burglar to be found. And it is equally natural, too, that he should suspect every closet and every piece of furniture as a place of concealment —until he investigates and proves otherwise.

* *

HE would not be a good sleuth if he approached his assignment with any less suspecting attitude.

* *

HENCE it was not exactly with surprise for the Editor to find himself regarded, politely, but nevertheless insistently, as a Suspicious Person. Nor was it without interest, perhaps tempered with flashes of irritation, that he observed the honestly-intentioned efforts of his distinguished hosts to interpret the editorial content of PUBLIC UTILITIES FORTNIGHTLY, as propaganda.

* *

THE only reply the Editor could make and would make, of course, was to present the actual facts—and to present those facts in such a form and on such an occasion as to insure their preservation for reference purposes, as a matter of record.

* *

HE was gratified to accept this opportunity.

HERE, for example, are some of the facts that were thus brought out at the hearing:*

* *

THAT a demand did exist and does now exist on the part of utility companies and lawyers particularly, and of State, Federal and other Commissioners, bankers, libraries and professors of economics, law and industry as well, for copies of the decisions, orders and recommendations of the State Commissions, and for the decisions of the courts, reversing or affirming the Commissions' decisions, so far as they deal with regulatory questions:

* *

THAT as no adequate means were available for publishing these decisions and orders, Public Utilities Reports was incorporated to meet this need:

* *

THAT the decisions, orders and recommendations selected for publication as well as the preparation of syllabi, is left exclusively in the hands of the Editor, without any outside influence whatever; and that all decisions are published in full or in abstract form:

* *

THAT the Editor's selection of decisions is made wholly without bias, prejudice or interference, with the sole purpose of serving the needs of those who demand authoritative information from official sources on all sides of controversial subjects that affect the regulation of our utilities:

* *

THAT to show any bias in the selection of these decisions and orders, or in the preparation of the syllabi, would destroy their value and defeat the very object of this publication—to furnish our readers with facts:

* *

THAT, as the official reporter of the National Association of Railroads and Utility Commissioners, any attempt by the Editor to publish partial reports of the Commissions' proceedings, or to furnish any but clear and correct interpretations of them, would receive —(and merit)—immediate check:

* *

THAT any reports of an incomplete nature, or reports selected for the purpose of supporting only one side of a controversy, or syllabi that gave evidence of prejudice, would be valueless, and the assumption that any lawyer would desire or could use such a mutilated and misleading record is "childish."

*(Should any of our readers care to go into further detail about them, they are referred to "Official Report of Proceedings Before the Federal Trade Commission," January 16, 1929; pages 6279-6334.)

(Continued on page VIII)

THE insistence of the interrogators in their efforts to disclose the Editor's motives in his selection and editorial treatment of court and commission decisions is revealed in the following dialogue, taken *verbatim* from the official report:

* *

Question: The question is whether there is an opportunity under this system (of selecting decisions for publication in *Public Utilities Reports Annotated* (which are published serially in this magazine), to make an important report of the effects of these decisions. In other words, in the system of not reporting in full many of the cases, was not there any opportunity not to give a clear or correct interpretation of the decisions?

Answer: Practically I would answer that question "no." It would be physically possible but not practical, because we are answerable to the National Association of Railroad and Public Utilities Commissioners. We are reporting their decisions. We are the official reporters of their decisions, and if anything like that happened, they would be down upon us like a thousand of bricks. We could not do it and escape detection even if we desired to do it. But there is no desire to do it because, as I say, the greatest disservice you can render to a utility company would be to misinterpret those decisions and state what they do not contain.

* *

Question: That might be true as to court decisions which are otherwise reported under other systems, but would it be true of these Commission reports, where there are not many reports? I believe you say that your set of reports is practically the only one that is available for the use of courts?

Answer: We could not do that without detection by the Commissions, and I think they would very quickly call the matter to our attention.

* *

Question: We are by no means implying that you are doing these things, but we are getting at whether this system afforded an opportunity for the exercise of improper control. . . . .

Answer: The best answer to that question seemed to me to be that these have been published for almost fifteen years and no question as to their impartiality has ever been raised, so far as I know, by anybody. I think that is a pretty good record.

* *

THAT the purpose sought in establishing this publishing house has been attained is evidenced in the following document (here reproduced only in part) that, during the course of the hearings before the gentlemen of the Federal Trade Commission, was marked for identification as *"Exhibit No. 4125."* It expresses the view of one of the most distinguished lawyers in the country:

* *

"The organizers of the publication realized that the system of State regulation was of tremendous interest and importance, not only to the owners of utility securities, but to the bankers, (as dealers in securities dependent on valuations, earnings and credit of the utilities), to manufacturers of electrical apparatus, and to the public, dependent on the sound expansion of the industry for increasing facilities for light and for mechanical power. State regulation was new and untried; it was realized that the future of the public utility industry was dependent on the determinations of principles involved in the regulation and knowledge of the decisions to be reached by the Commissions.

* *

"No provision was made by the public, represented by the Commissions or otherwise, for a system of reports of public utility decisions, available throughout the country.

* *

"A national reporting enterprise was projected, and it could be financed only by private enterprise, with the firm expectation that if the importance of State regulation and the tremendous importance of public utilities under State regulation were fully appreciated, the public demand would support the national publication.

* *

"The State Commissioners welcomed the enterprise, gladly furnished copies of their decisions and, after a trial which definitely proved the sound management and faithful impartiality of the editorial work, the commissioners abandoned an enterprise for printing the decisions fostered by their National Aossociation and endorsed and have supported *Public Utilities Annotated.*

* *

"The effect of the national publication, by which the reports of decisions of all the State Commissions have been made available to every Commission and to utility companies and bankers and others interested, has been monumental. The decisions of the several Commissions, through a national publication subjected to scrutiny of every other Commission and to bankers and lawyers and of the courts, have, much more rapidly than could have been expected, developed a sound system of public utility regulation, based on constitutional principles which could be and which have been supported by the decisions of the courts.

* *

"As a result, bankers and investors have been able to rely upon those principles as the basis for investment and credit. The enormous sums which the public has supplied through the bankers to the development of the public utility industry, would not have been provided under any other conditions. The growth and the value of public utility enterprises has been large, but the increased values made possible by public utility expansion, in real estate and in industry, have been vastly larger; particularly the evolution of electrically driven, labor, time and money saving devices. The short time in which these results have followed is due largely to the national publication and wide distribution of *Public Utilities Reports Annotated*; without that publication, these results would have been accomplished very much more slowly, at great national expense.

* *

"The wide distribution of these reports, so that they may be accessible to all classes of people, Public Utility Commissioners, judges and municipal officials, as well as bankers and utility executives, has been a necessary incident to the rapid development of the public utility industry."

* *

THUS the record stands as ineffaceably as the famous record of the ship captain who entered in the logbook "The mate was drunk today"; in answer to the mate's protest the captain asked: "It's true, ain't it? Well, there it stays."

* *

A LITTLE later, however, it was the mate's turn to keep watch. When his chief inspected the log, he found the entry "The captain was sober today."

* *

"IT'S true, ain't it?" was the mate's cold retort. "Well, there it stays."

* *

THE Editor is grateful to the gentlemen of the Federal Trade Commission for the opportunity they gave him for thus making public the work, the methods and the purposes of this publication.—THE EDITOR.

FEBRUARY

Reminders of Coming Events		Utilities Almanac	*Notable Events and Anniversaries*
21	T^h	Work was started on the construction of the famous locomotive "John Bull" for use on the Mohawk & Hudson Railroad, 1831.	
22	F	First railroad in California, 22½ miles long, was opened between Sacramento and Folsom, 1855. Ground was broken for Central Pacific Railroad, 1863.	
23	S^a	U. S. Congress passed an act creating the Federal Radio Commission, with regulatory powers over broadcasting, 1927. Express business started, 1839.	
24	S	The first overhead trolley car was run in Richmond, Va., by FRANK J. SPRAGUE, 1888. First telephone exchange in Colorado was opened in Denver, 1879.	
25	M	First pair of railroad tunnels was bored under the Hudson River, connecting New York and New Jersey, 1906. E. H. HARRIMAN, railroad magnate, born 1848.	
26	T^u	Underground telephone cable between Boston and Washington was placed in service; 144 miles of it was underground; 1914.	
27	W	Coal gas was first used for house lighting by WM. MURDOCK in England, 1779. *The Chamber of Commerce of the U. S. A. meets in Washington, April 29-30, 1929.*	
28	T^h	U. S. and Canada agree to limit water of Niagara Falls used for power, 1902. First American railway (Baltimore & Ohio) was chartered, 1827.	

MARCH

1	F	Direct radio circuits were opened between New York and Great Britain, and between San Francisco and Hawaii, 1920.	
2	S^a	The public-owned Emergency Fleet Corporation, for first time in history, announced a profit in operating vessels, 1922.	
3	S	U. S. Congress voted $30,000 for building Morse's telegraph line from Washington to Baltimore, 1834. ALEXANDER G. BELL was born, 1847.	
4	M	BIRDSALL HOLLY of Lockport, N. Y., transmitted steam through an underground pipe to a radiator in his house, marking the beginning of modern steam heating, 1877.	
5	T^u	The largest telephone cable in the world was put in service between New York and Chicago, 1925. GEORGE WESTINGHOUSE received patents for his air brake, 1872.	
6	W	JOHN WANAMAKER startled the customers in his Philadelphia store by the first use of arc lights, "miniature moons held captive in glass globes," 1878.	
7	T^h	International radio-telephone communication began with a conversation between New York and London, 1926. First telephone patent was taken out by BELL, 1876.	

"The rank of the individual in industry may be gauged by the horsepower that he can command, and the rank of the nation by the per capita horsepower it has harnessed."—JOHN HAYS HAMMOND.

Drawing by Abell Sturges

RICHARD T. HIGGINS

Chairman of the Connecticut Public Utilities Commission

—SEE PAGE 199

Public Utilities
FORTNIGHTLY

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The PUBLIC UTILITIES AND THE PUBLIC

ONE of the biggest arguments in favor of mergers and the corporate control of local utilities by national holding companies in view of the operating economies they achieve has been the so-called "air-tight" character of local regulation. It is said that it does not matter what fanciful figure a holding company may pay for a local utility or how it may juggle its costs, because the supreme power of the State Commission to regulate local rates, based on the actual value of property used in the service, can be depended upon by the Courts and Commissions to take care of the rights of the consuming public.

The Missouri Commission, however, claims to have found a loop-hole in this scheme of regulation and has announced that in certain instances competition may be used to bring an interstate wholesale company supplying a local utility, to time, if other means fail.

For a number of years a certain company has distributed natural gas in the vicinity of Kansas City. This company buys its supply from a wholesale interstate company at the state line. In previous proceedings the Commission was told by no less an authority than the United States Supreme Court that it had no right to interfere with the rates fixed in the supply contract between these two companies, notwithstanding the fact that there were strong indications that both companies were corporately associated. The Commission felt that this situation permitted the possibility of evasion of state regulation by the mere expedient of padding the charges in the supply contract.

Recently an independent company, entirely subject to the jurisdiction of the Commission, asked for authority to operate somewhat in competition with the existing company. The latter claimed that the policy of the state required the Commission to protect

its monopoly. It was decided, however, that, under the circumstances, the Kansas City company was not such a guarded monopoly as would be entitled to the protection of the Commission from competition. The opinion states:

> "It may be said that the prevailing policy in state regulation of public utilities is to favor regulated monopolies rather than to encourage competition. But this is by no means an absolute and unvarying rule. In its application it is designed to protect and promote the best interest of the public, and when it fails to do this there is no reason why this policy should be followed."
>
> *Re* Industrial Gas Co. No. 5771.

It would seem that a state would have a right to withdraw protection from competition if it were deemed wise, as freedom from competition is a privilege, not a right that is guaranteed by either Federal or State Constitutions.

Court Decisions that Curb the Effectiveness of Commission Regulation

THERE seems to be a tendency on the part of the courts in one or two States to deal with Commission decisions in such a way as to weaken, to some extent at least, the effectiveness of Commission regulation. This has to do with the consideration to be given Commission findings of facts when the cases come before the courts on appeal. The great weight of authority is to the effect that the conclusions of the Commissions as to facts will not be set aside on review unless they are against the manifest weight of evidence. The highest court of Missouri, however, has held that the courts are not bound by the findings of the Commission, but can determine for themselves questions of facts from evidence submitted on appeal. The court, however, did give to the Commission findings a bare presumption of accuracy.

In June, 1928, the supreme court of Kansas went a step further when it held that the presumption of validity attending a Commission conclusion no longer obtained in an appellate court when the order had been reversed by an intermediate court of law, and that the presumption in such a case was in favor of the lower court. In November of the same year the court asserted that it would not even go into the findings of fact by a county court in reversing a Commission order; but that such findings were conclusive on appeal.

State ex rel. Pugh *v.* Public Service Commission (Mo. Sup. Ct.) 10 S. W. (2d) 946; Wichita Gas Co. *v.* Public Service Commission (Kan. Sup. Ct.) P.U.R.1928D, 124; Wichita *v.* Hussey (Kan. Sup. Ct.) 271 Pac. 403.

The Value of Giving Authority to State Commissions Over Municipal Plants

WHAT would happen if there were no Public Service Commissions is often brought sharply to the attention of citizens who are trying to have their complaints about utility service satisfied. Mr. J. C. Davis, for exam-

ple, is the owner of an automobile service station in Murray City, Utah. The Municipal City Electric plant refused to give him service on the same condition, under which it furnished service to other citizens of Murray. He complained to the Commission, only to learn that the Commission could do nothing about it, as it does not have jurisdiction over municipal plants. If the city stands its ground, Mr. Davis will have to go to court to have his rights determined.

That is exactly what would happen in every case, were it not for the expeditious means of handling complaints of this kind afforded by experienced Commissions, that have power over service questions.

Davis *v.* Murray City, P.U.R.1929A, 417.

A New Plan for Making the Consumer Pay for Court Fiddling

THE citizens advisory council of Washington, D. C., has approved a proposed amendment to the Public Utilities Commission Act which would require utility corporations to pay court costs both for themselves and for the Public Utilities Commission, in those cases where appeals are taken from the findings of the Commission.

The result of such an amendment would be, of course, to shift the court costs from the public at large to the rate payers of the utility.

The Reservation of Electric Ducts by Traction Companies that Abandon Service

IN the rapid increase of land values in the metropolitan area of New York city, space or the right to use any space on Manhattan Island is worth much money. In the franchises given to different surface street railways by the city of New York there is given the right to maintain in the streets and avenues along the traction route underground ducts for electrical conductors. Within the last few weeks four of these companies applied to the Transit Commission for approval of certificates and declarations of abandonment covering certain routes. These declarations contained a reservation, however, that the different companies should be permitted to retain the right and franchise to construct and maintain these ducts in the streets and avenues affected.

Commissioner Lockwood was of the opinion that the application should be denied until this reservation was removed. He believed that the company was trying to abandon routes and relieve themselves of obligations and at the same time retaining ducts which were inseparably connected with the franchises to be abandoned. It was observed that railroad companies frequently lease the rights to use such ducts to electric and other corporations. Mr. Lockwood further stated:

"The right to maintain ducts is part of the franchise and cannot be separated therefrom. If the franchise is

abandoned, the right to maintain the ducts ceases. If the particular franchise to maintain the ducts is abandoned, it is as if the limited franchise had expired. This would give the city the right to exact compensation for the use of the ducts. This should apply here. To permit the companies to be relieved of paving costs and to reserve the ducts would place a cloud on the title to the streets and, perhaps, cause litigation against the city."

Re New York R. Corp., Cases Nos. 2939--2942.

The Indiana Commission Okays a New Million-Kilowatt Generating Plant Near Chicago

THE process of the centralizing of electric generation which has gone so far and with such satisfactory results to the public has achieved the approval by the Indiana Commission of one of the greatest electric generating projects ever attempted. There are four distributing utilities grouped about the metropolitan area of Chicago; two of these are Illinois companies, one serving the city of Chicago and the other northern Illinois. The two others are Indiana utilities. These four companies all belong to the so-called Insull group, and some years ago the officials conceived the idea of the highly economic desirability of a central generating plant near Chicago but on the border of Lake Michigan so as to use the waters for condensing purposes. Accordingly a new company was formed known as the State Line Generating Company. Its plant is built on approximately ninety acres located in the extreme northwest corner of the state of Indiana, a greater portion of this, approximately seventy-five acres, consists of land which the company has made by filling in Lake Michigan. A part of the west boundary of this tract is the state line between Illinois and Indiana and incidentally a part of the east city limits of the city of Chicago. Construction has been under way for two years and the plant when completed will be one of the largest in the world, with a capacity of more than one million kilowatts. The contracts between this interstate company and the distributing utilities were approved by the Commission with certain exceptions. The Commission said that the agreement should be asked for a shorter period than fifty years unless the right of the Indiana Commission to inquire into all phases of operation and to enforce strict and faithful compliance with the terms of the contract both with regard to operating costs and the rates charged were conceded. This observation was made because of the jurisdictional complications that would arise in view of the interstate character of the commerce. The Commission also reserved the right to fix the rate of return, the rate of depreciation, and the amount of working capital of the generating company, and disapproved parts of the contract that might be understood as leaving these functions to the utility itself. The Commission finally made a reservation safeguarding the availability of supply to the Indiana consumers as compared with the Illinois distributing companies.

Re State Line Generating Co., Nos. 9488, 9489.

How Long Before Ancient Overcharges Are Outlawed?

IN 1909, Mr. Charles Dailey, Sr., of Aspen, Colorado, publisher of the Aspen *Democrat* agreed to pay $20 a month for the electric power used in the operation of his printing plant. This flat rate was paid up until 1927 but several times during this period Dailey and his son complained about their bill and asked if cheaper rates were not possible. On each occasion the electric company said that the rate was the very lowest it could give.

In 1928 the company's representative conferred with the city council about a proposed franchise. It so happened that Mr. Dailey was a member of this council and during the discussion, he suddenly became aware that the power rate proposed was quite a little lower than he had been paying all these years. Mr. Dailey went home and did some serious thinking about matters not altogether of municipal concern. He called up the company and asked that a man be sent to test the maximum demand of his electric equipment. The company sent a man who tested the maximum demand at less than three horsepower. The company sent two more testers but the results were pretty much the same and Mr. Dailey concluded that the company owed him a lot of money.

He asked for a recovery of his claimed excess payments from the Colorado Commission. It was a rather unusual proceeding and in a very interesting and detailed opinion the Commission concluded that Mr. Dailey had paid about $2,168.72 more than was necessary. All of this could not be allowed, however, under the Commission ruling because of statutory limitations appearing in the Colorado Public Utilities Act restricting the jurisdiction of the Commission for the awarding of overcharges where claims were not brought within two years after the right accrued. The Public Utilities Act did not go into effect until 1913. Among the other interesting rulings made by the Commission was a finding that the ordinary statute of limitations did not apply to Commission proceedings. No final order was entered for the amount of reparation to be recovered pending the filing of petitions by both sides agreeing on the amounts actually paid.

Dailey *v.* Roaring Fork Water, Light & P. Co. Case No. 348, Decision No. 2034.

Why Commissions Deny Free Utility Service to Churches and Hospitals

THE mayor of Waterbury, Connecticut, complains that the city does not receive any direct income from more than half of the water used. The bulk of the water, it seems, is used by the city itself in its schools and public buildings and in the fighting of fires, and for this no charge is made. The churches and hospitals are also given water without charge.

This is not quite so bad as it looks. If the city owns its own water works it makes little difference, aside from

an accounting proposition, whether or not it bills itself for the water it uses in its public buildings or for fire protection. The money to pay for this water would have to come out of the pockets of the taxpayers either way. There are two possible objections to the city's practice; one is that those who pay for the service may be overcharged in order to help pay the cost of the service rendered to the city. The other is that the citizens may think that the city, by operating its own plant, is getting its water for nothing, when in fact they are paying for it through the tax levy.

Serving churches and hospitals free is undoubtedly bad practice, as this amounts to a tax on the citizens for charitable and religious purposes. It is a discriminatory practice that is not permitted where utilities are under the jurisdiction of State Commissions.

Does the State or Federal Commission Have Precedence?

JUST at present an interesting situation exists with reference to the development of water power, because of the respective control of the Federal and State governments over that subject. By an act of Congress, anyone who seeks to develop water power within the United States must obtain a permit from the Federal Power Commission before he starts construction. The purpose of this act is the conservation and regulation of the natural power resources of the nation. The states also have a great deal of interest in hydroelectric exploitation, and many states require companies contemplating such projects to obtain a certificate of convenience and necessity from the local State Commission.

But which Commission comes first?

Some months ago the Tennessee Eastern Electric Company planned to develop certain sites along the Holston river. The Tennessee Commission heard about it and on its own initiative cited the company to show cause why it should not apply for state authority before proceeding further. It was the position of the Commission that the Federal Water Power Act required such applicants to comply with state requirements as a condition precedent to the issuance of Federal authority (P.U.R.1927E, 670). This position was sustained by the Tennessee chancery court. (P.U.R.1928D, 50.)

Not long ago the Colorado Commission, in passing upon a proposal to develop the famous Royal Gorge in that state, decided that authority from the Federal Commission should be secured before the state body could entertain a formal application for a certificate of convenience and necessity.* This opinion expressly disagreed with both the Tennessee Commission and chancery court.

Now the highest court of Tennessee in the latest action on the Holston river case comes back with a solid affirmance of the position of the Commission and lower court of that state. This leaves the Federal Power Commission to make the next move.†

* *Re* Public Service Co. P.U.R.1929A, 259.

† Tennessee Eastern Electric Co. *v.* Hannah (Tennessee Supreme Court) Dec. 22, 1928.

Inadequate Utility Service Drives Away Business

THE city of Lancaster, Pennsylvania, needs to enlarge its water works, says City Commissioner Charles M. Howell. Recently a firm refused to locate in Lancaster, he declared, after it had looked over the situation. This firm would have used many gallons of water, and an investigation by its representatives resulted in the industry looking elsewhere for a suitable location. He added that many other plants had been kept away for the same reason and because of the knowledge that fire-fighting facilities were inadequate.

Adequate public utility service, in addition to raising the standard of living conditions of the people, has an important bearing on attracting industries to the communities served. If a utility becomes crippled other business suffers.

Insufficient Appropriations Threaten the Public Interests

GEORGE M. Putnam, president of the New Hampshire Farm Bureau Federation, in his annual report, stresses the need of providing the Public Service Commission with more money and more workers with which to protect the interests of the people, in view of the fact that the utilities are given exclusive territorial rights and protected from competition. He says among other things:

> "With the increasing development of hydro-electric power, and the tendency toward consolidation into large units now rapidly going forward with all types of public utilities, it is not only desirable but absolutely necessary that our Public Service Commission be strengthened both in finance and personnel, if the public is to receive the protection to which it is entitled. All county Farm Bureaus in annual meeting have, by resolution, approved sufficient appropriation and added legislation if necessary, for the protection of the public."

This is good advice. Many Commissions have been handicapped by insufficient appropriations and then blamed for not being more active. It costs money to support effective regulation, but the amount saved by the public through such regulation justifies that expenditure many times. The public saves through adequate and proper regulation very much more than it costs.

Telephone Booths as Substitutes for Fire Alarm Boxes

IT appears that the Illinois Bell Telephone Company and the Chicago Retail Druggists Association had some trouble and that the druggists ordered their booth telephones removed. There was some public concern about this, due to a shortage of fire-alarm boxes in the city. This is a use of phone service that the public seldom thinks about. Instead of running to a fire alarm box, how easy it is to step to a phone and call the fire department! Yet not very many years ago it was said the telephone would never be more than a "scientific toy" or plaything.

When a Too-Low Utility Rate Becomes a Subsidy

A SLIDING scale of water rates is needed in Jersey City, in the opinion of Commissioner Michael I. Fagan, Director of streets and public improvements, in order to attract and hold industries and prevent them from moving to other cities where the rates are lower. Low rates for wholesale use of service are justified provided the service is not furnished at less than cost. Service furnished to industries, at less than out-of-pocket expense, amounts to a subsidy at the expense of other users of the service. This is one of the many forms of discrimination which existed before State regulation of public utilities. If it still continues in some quarters, where regulation is not in effect, it should be discontinued. But it is also unfair to charge a large user of service the same rate as a small user.

Scientific rate schedules provide for a sliding scale of charges for water service downward as use increases, as has been suggested by Commissioner Fagan.

A Quaint New Jersey Custom Leads to Complications

A CONSIDERABLE number of patrons of the Plainfield-Union Water Company appear to have established a quaint custom of not paying their bills until the water man arrives with a wrench in his hands to cut off service. This custom also appears to have caused considerable annoyance to the officials of the company and the management recently decided to refuse to allow their employees to accept payment under such circumstances. Numerous complaints were then made by the patrons to the New Jersey Board.

The company in defense of its practice claimed that many of its customers have regularly disregarded the notices that service would be discontinued if the bills were not paid. At the hearing the president of the company stated:

> "I know very well this business of turning off water is a drastic remedy to collect a small bill. The company has a standing order, if anybody applies to the company and gives any reason, sickness or inability at present to pay, to always extend credit and say, you can pay next month or whenever convenient to do it."

With respect to one of the parties complaining, the secretary and treasurer of the company testified:

> "We had to go there to collect the last seven bills out of nine rendered and in two cases she gave the collector worthless checks. They were protested at the bank and returned to us and the collector was sent back there with the protested check and told her that if she did not make it good with cash, the service would be discontinued forthwith."

The New Jersey Board decided that the rule of the company might not be unreasonable if adequate notice had been given to all customers of its change in procedure. No final order was made with regard to setting aside the regulation but further consideration of the merits of the matter was indicated.

Re Plainfield-Union Water Co.

The Tennessee Commission Defines a Rate-base

THE true basis of utility valuation has been so often discussed and disputed by different authorities and tribunals that a restatement of the law as it stands to-day is always in order. There is little question about what the law requires in the calculation of a utility's rate base but every now and then some one will persist in reading into the controlling decisions of the supreme court something that is not there. The supreme court once said that reproduction cost must be given consideration but it never said that this value is absolutely controlling. An inferior court went so far as to say that reproduction cost must be given "dominant consideration" but this was not the supreme court. Therefore, a carefully phrased statement of the law on this subject by the Tennessee Commission is particularly welcome. The opinion states as follows:

> "It is the opinion of the Commission that for rate-making purposes, the value of the utility property should not be determined solely and alone on the basis of reproduction cost less depreciation, nor solely and alone on the basis of original cost, nor solely and alone on the basis of historic cost, nor solely and alone on book value; but that due consideration under the facts of each given case must be given to each of these bases as elements to be considered in arriving at the proper rate base; and these are not the only matters to be considered, as will be seen by the authorities hereinafter cited in this opinion."

The Commission then proceeds to review the holdings of the highest court on this important subject.

Re Nashville R. & Light Co., Dockets Nos. 1103, 1114.

Fixing a Measure of Value for Rate Making Is Not a Legislative Function

ACCORDING to newspaper reports, an organization known as the "Telephone Investigating League of America" has been formed. This new league wants to find out how the telephone companies value their properties and make their rates; it also wants to know more about the relationship between the American Telephone & Telegraph Company and its subsidiaries, and whether the Sherman Anti-trust Law is being violated.

It should not be very difficult for the league to obtain this information.

One purpose of the league is to interest Congress in legislation which will set a basis for valuing telephone property for rate making. This, however, is something Congress cannot do. Suggestions of that kind are made from time to time, but fixing the measure of value for rate-making is not a legislative matter. Congress can no more fix the value of utility property, than it can, by merely declaring a business to be a public utility in name make it a public utility in fact.

¶ *The economic reasons for the adoption of present costs in valuation of utilities will be pointed out in the next issue by* PROF. HARRY GUNNISON BROWN

The "Break Down" of the State Commissions

The Charges:

On Monday, January 21, 1929, THE WORLD, (*New York*) published an editorial under the title "The Breakdown of the Public Service Commissions." Specifically, it made the following assertions:

> "The high hopes with which the existing system of public utility regulation was inaugurated in this state have not been fulfilled. It is a fact beyond dispute that in certain important respects this system has broken down. . . ."
>
> "The new system was intended to end the existing evils. Its purpose was to put the utilities under such positive Commission control as to assure them a fair return and at the same time assure the public of reasonable rates, adequate service, efficient operation and proper financial management. In large measure these hopes have failed. . . ."
>
> "The public has come to realize that its expectations of twenty years ago have not been fulfilled; that regulation has not worked as it was intended to work; that many of the old evils have continued; that new ones have developed; and that the intricate questions of law and administration which govern the the cost to the citizen of light, fuel, power, local transportation and telephone communication are in a desperate tangle."
>
> "There is widespread recognition of the fact that the present system no longer protects the public's interests adequately. . . ."
>
> "What is needed is no mere tinkering with the existing law but a comprehensive investigation to discover exactly how regulation has worked in the state of New York, what difficulties have been encountered and by what means the present system can be reconstructed to serve effectively the purposes for which it was originally established. With this aim in view we believe that the legislature should provide for a special Public Service Investigating Commission to make a thorough survey. . . ."
>
> "We face a fact and not a theory. The Law of 1907 has broken down."

A reply to these charges is published on the following pages; it is based upon information obtained within the past few days from authoritative—in most cases official—sources.

By H. C. SPURR

"Commission regulation has broken down," says the New York *World*. So it calls on the legislature for an investigation.

"State regulation of public utilities has not broken down," answers Chairman William G. Fullen of the New York Transit Commission.

"I love investigations," declares Chairman William A. Prendergast of the Public Service Commission, "especially investigations by the legislature. So bring on your investigations."

"A great many states are in the same barrel," remarks Governor Franklin D. Roosevelt, referring to the charges of the *World*.

"If utility companies are defeated before the Commission, an end should be put to the practice of taking their cases before the courts, particularly the Federal courts," believes Aldermanic President Joseph V. McKee of New York.

"All Commissions are pawns in the hands of big business which looks upon the play of the contending forces before Commission as so much hot air," thinks Henry W. Beer, president of the Federal Bar Association.

Taken altogether this looks pretty bad doesn't it?

The *World* makes it clear that it is not aiming at any particular Commission, but at the whole system of Commission regulation. Although the confidence inspired by Commission regulation and comparative freedom from political interference during the last twenty-five years has led to an unparalleled development of the utility industry on the one hand, and to the savings of millions of dollars to rate payers on the other, the *World* and its followers assert that the system of Commission regulation has broken down in New York state and elsewhere; that the utilities have destroyed any effectiveness the Commission might have by appeals to the courts; and that the Commissions themselves are under the thumb of the big utility companies.

These charges conflict to some extent; but that is what the critics of Commission regulation think and say.

Similar attacks have been made on State Commissions and the State Commission system of regulation in other states, but these assaults have usually left the Commission more strongly entrenched than ever.

The attack of the New York *World* is not unique. Some years ago there was an investigation of the California Commission by a hostile legislative committee. As a result of that investigation, the committee acknowledged that many of the preconceived ideas of its members had undergone a complete change. The work of the Commission was commended in the warmest terms. The "great public utility act" was committed to the favorable consideration of the people by the investigating committee. "It has worked well and is working well today," said the committee. "Strengthen it rather than weaken it."

The more thorough the investigation of Commission activities the better it will be for Commission regulation. There is profound ignorance on the part of the public as to the work

of the Commissions. An investigation will be costly, but if it results in the publicity necessary to inform the public and certain newspapers of what the Commissions are doing for the public it will be worth while.

THE *World's* charge that the system of regulation has broken down is based on a common error. The *World* points to the time taken for the decision of certain great cases, involving large property interests, and then assumes that this is the course of procedure in all instances. One often hears the same complaint against the courts. The popular impression is that owing to time required to dispose of certain cases by the courts our legal system has broken down. What is overlooked is the fact that the bulk of legal business is not transacted in court rooms, but in law offices. Persons occasionally take their disputes to the courts and get guiding rules established. This may involve time and expense, but once a case is decided by the courts it serves as a precedent and, after that, ten or a hundred or a thousand or more transactions of the same kind take place without litigation or delay. Lawsuits are, therefore, the exception rather than the rule of legal practice. The court cases, however, are noticed while business transacted under the law established in such cases gets no attention. So the real role played by the courts in the dispatch of business is seldom appreciated.

It is the same with procedure before the Commissions. Not one-tenth of one per cent of the kind of cases mentioned by the *World* come up before the Commissions. In the last few years the publishers of this magazine have received over 40,000 decisions and orders of State Commissions throughout the country, only a small portion of which involved expensive litigation or delay and only a still smaller part of which got into the courts. In addition to that, during the same period many more thousands of complaints against utility companies were adjusted by the Commissions without formal hearings, without expense and without delay—something never done before and which could not be done at all were it not for the Commissions and for these occasionally litigated cases.

This is only a very small part of the picture but it is enough to show that the reasoning of the *World* based upon delay in handling litigation is, to say the least, superficial.

IT takes time to decide great law suits. It costs money to carry them on. But great law suits save the public time and expense in the end—much more than they themselves involve.

Alderman McKee's suggestion that utilities be kept out of the courts belongs to the fanatic fringe of criticism with which State Commission regulation is pestered. The doors of the courts cannot be closed either to the utilities or to the rate payers. Our attitude towards the courts often depends on whether we wish to infringe on the rights of other persons or other persons desire to infringe on ours. If we are doing the infringing, we may not like the courts. If we are being infringed on, we may be very glad of their protection. The right of appeal to the courts is about the last privilege

civilized people should wish to abolish. It is one of the great bulwarks of our liberty and security.

There may be some excuse for the hostility of laymen towards the courts, but President Beer of the Federal Bar Association ought to know better than to say that all Commissions "are pawns in the hands of big business," as he is reported to have said. His statement amounts to a charge frequently made that the Commissions favor the corporations and pay little attention to the public.

This charge of Commission favoritism towards the corporation bears all of the earmarks of buncomb.

What are the facts?

Those who make the charge present none. Mere statements of corporations on one side or anti-corporation advocates on the other do not furnish very satisfactory evidence in support of the truth or falsity of the statement. We can find a very convincing answer, however, if we turn to the decisions of the courts in which Commission decisions have been reviewed.

FROM 1914 to 1923 some 470 appeals from Commission decisions were published in *Public Utilities Reports*. In these appeals the Commissions were sustained by the courts 285 times and reversed 185 times. The instances in which the Commissions were sustained may be disregarded, since the presumption would be that Commission decisions were correct; at least the burden of showing favoritism in these cases would rest on those making that charge. It is to the cases in which the Commissions have been reversed that we would naturally look to discover evidence of favoritism toward the public utilities.

Let us see what actually happened.

Of the 185 reversals, 26 were only partial—the decisions of the appellate court somewhat favoring both parties —but out of the 159 straight reversals, 145 of the decisions of the Commission were against the contentions of the corporations. Of the 14 remaining, 6 reversals were not on the merits, and not one of the remaining 8 decisions points in the slightest degree to favoritism.

An examination of appeals from 1923 to 1928 shows that instead of a consistent policy of rulings in favor of utilities, the Commissions have exhibited a zeal in favor of public rights which has resulted in a large number of reversals of Commission decisions. Out of the 490 cases in which Commission decisions have been reviewed during this period, 418 indicate on their face that the Commissions have not favored the utility; nor is there the slightest evidence of favoritism in any of the others. Even if a case is decided in favor of the contention of a corporation, that fact alone is not sufficient to show favoritism. It is conceivable that there may be an honest conflict of opinion on questions brought before the Commissions, a fact which is often overlooked by parties to controversies. A corporation may occasionally be right.

IN the Southwestern Bell Telephone case decided by the Supreme Court of the United States in 1923, Mr. Justice Brandeis wrote a dissenting opinion which is looked upon as a sort of Magna Charta by the opponents of the present value theory of rate making. Mr. Justice Brandeis found in *Public*

Utilities Reports from 1920 to 1923 some 363 cases decided by Commissions. On the question involved, all except 5 were against the contentions of the corporations. Even in those 5 cases, the Commissions were probably not following their own inclination, but were adhering to rules laid down by the courts by which they deemed themselves bound.

In 63 of the cases the Commissions severely criticized or expressly repudiated reproduction cost as the measure of value, something the utilities were contending for.

With the knowledge of such a record as this it would be sheer intellectual dishonesty to assert that corporations are "mere pawns" in the hands of big business. Talk of this kind is nothing but malicious gossip, circulated by unfriendly critics of Commission regulation. There is no truth in it.

HAS state regulation of public utilities been ineffective? Let us examine the facts.

The Commissions have passed on thousands of controversies, many of which have involved property interests of great value and public rights of vital importance. Valuations of utility property have been made on theories favored by the public rather than the corporations; but many of these valuations have been over-turned by the courts as too unfavorable to the utilities. Rate reductions, however, were the rule prior to the war and in the gas and electric industries at least they are the rule today.

The saving to the public as the result of the action of the Commissions has amounted to millions and millions of dollars. There is plenty of proof of this.

IN California, according to a statement of Henry A. Frazier, recorder of the California Railroad Commission, for every dollar expended by the Railroad Commission in regulating utilities of that state, there has been returned to the rate payers $7 in reduced utility charges, irrespective of any savings accruing because of the refusal of the Commission to sanction requested increases in rates for the part played by the Commission in winning substantial reduction in interstate rates. Reductions in rates in California aggregated $3,392,458 during the brief period from December 15, 1927 to June 30, 1928, when a careful compilation was kept by the Commission. A conservative estimate of the savings for the entire year through rate reductions would amount to $3,500,000.

IN Georgia, during the last eighteen or twenty-four months, the Georgia Public Service Commission has ordered reductions in electric rates amounting, in the aggregate, to approximately $1,200,000 a year. Reductions in gas rates during the same period will amount to $300,000 a year.

IN Indiana the Public Service Commission has completed a fairly thorough examination of rate reductions made under its supervision and of voluntary rate reductions by public utilities during the past year. The approximate reductions to consumers of electric current in Indiana during the past five years has been more than $6,000,000. Reductions in rates for gas service have been made princi-

pally during the last two years. The Commission estimates that such reductions amounted to more than $200,000 during that period.

In Maryland, Chairman Harold E. West of the Maryland Public Service Commission reports that beginning with a rate reduction July 1, 1923 affecting the largest company under the jurisdiction of the Maryland Commission and continuing until December 31, 1928, the savings to the gas and electric consumers over rates prevailing June 30, 1923 have been approximately $12,250,000 of which approximately $8,750,000 were to consumers of electricity and $3,500,000 to consumers of gas. In that time there were three reductions in the electric rates of this company and one in the rates for gas. As a result of the reduction in rates for electricity and gas made July 1, 1923, there has been a saving to consumers of nearly $8,000,000 to December 31, 1928. Of this amount nearly $3,500,000 was to gas customers and nearly $4,500,000 to electric customers. A further electric rate reduction, effective November 1, 1925, has resulted in a saving to date of approximately $2,650,000; a third reduction, effective January 1, 1927, has resulted in a saving to date of approximately $2,000,000, bringing the grand total of savings to customers of this one company since July 1, 1923, to the approximate figure of twelve and a quarter million dollars. A still further rate reduction is in prospect for 1929. Another large company whose principal business is in an adjoining jurisdiction but which serves a thriving section of rural and suburban Maryland with electricity has been required to make reductions since 1925, amounting to more than $800,000 to December 31, 1928, and it is estimated that the savings to the Maryland customers of this company will be $400,000 for 1929. In addition, gas and electric rate reductions made by order of the Commission by the small companies scattered throughout the state, serving small towns and rural communities, have amounted to $250,000 or $300,000, so that a conservative estimate of the savings to gas and electric customers in Maryland since July 1, 1923 would be somewhere between $13,000,000 and $14,000,000.

In Michigan, the savings to electric consumers during the last five years, through rate reductions, amount to $14,597,388. During the same period, the amount saved to gas consumers, through rate reduction in the same state, totals $1,175,171.

In Missouri, during the year 1928, the Missouri Public Service Commission, through formal investigations and conferences with utility operators, caused reductions in electric rates which saved the consumers over two million dollars a year.

In Nevada, a state of small population, the Public Service Commission, by refusing to authorize the Reno Gas Company to increase rates 40 per cent, saved the rate payers $30,000 annually. Savings to electric consumers of Tonopah, Goldfield, Manhattan, Round Mountain, Ely, and Las Vegas amount to $100,000 annually, due to orders of the Commission requiring the Nevada-California Power Company to eliminate

surcharges, and an order requiring the Ely Light and Power Company to reduce their lighting and power rates, and to an order requiring the Consolidated Power and Telephone Company of Las Vegas to reduce rates for lighting and power service.

IN New Jersey, president Joseph F. Autenrieth, of the New Jersey Board of Public Utility Commissioners, estimates savings to gas and electric consumers in New Jersey for the year 1929, due to voluntary reductions of rates of companies under the jurisdiction of the Commission, at $8,134,810 based on a series of reductions running over a period beginning in 1924.

IN New York, in the Consolidated Gas Company consolidation proceedings (P.U.R.1928E, 19, 32), the New York Commission said:

> "The Commission is justified in taking notice of the fact that the Brooklyn Edison Company has made reductions in rates during the past five years which total some $8,000,000. The New York and Queens Electric Light and Power Company has made reductions since 1924, which computed to July 1, 1929, being one year from its last reduction, represent savings to consumers of $3,500,000. The Westchester Lighting Company has made reductions since March 1, 1926, which, computed to June 1, 1929, one year from the date when its last reduction went into effect, represent savings of $1,250,000. The Bronx Gas and Electric Company has, since June 1, 1927, made reductions which, computed to June 1, 1929, one year from the effective date of its last reduction, represent savings of $325,000. These savings to consumers represent a total of approximately $13,000,000, and all these reductions have been the result of negotiations between the Public Service Commission and the companies, the reduced schedules having been placed in force voluntarily without any of the delays attendant upon rate cases, or a dollar of expense to either the state or the company, which means the consumers." *

IN North Dakota, president C. W. McDonnell of the North Dakota Board of Railroad Commissioners estimates that the savings to gas and electric consumers in that state in the last five years, due to rate reductions either voluntary as a result of negotiations with the Commission or by the order of the Commission after investigation, have amounted to $4,400,000 to electric consumers and to $100,000 to gas consumers, making a total of $4,500,000. About 2,700 miles of electric transmission lines have been built in the last five years and most of the towns formerly receiving short time service from local plants at very high rates now have the best twenty-four hour service at a greatly reduced rate.

IN Pennsylvania in a hearing before the Interstate Commerce Committee of the United States Senate last year, Chairman William D. B. Ainey of the Pennsylvania Commission presented a statement of the development

* Chairman William A. Prendergast has since stated that the Edison Company of New York city made effective last October a new schedule which will cause a reduction of $4,500,000 this year, making a total reduction of $17,500,000. All of this was the result of negotiations between the Commission and the companies. Without litigation it would be a difficult matter to estimate the total amount of savings to rate payers of New York state due to the system of state regulation, but it has unquestionably been enormous.

of the electrical industry in that state under regulation in effect since 1914; in this statement he said that electric consumers in Pennsylvania are today saving on the average approximately $25,000,000 a year over rates that were in effect in 1914; that this period of reduction of rates and extension of service had been coincident with the investment of $640,000,000 in power plants and distribution systems; that under the regulatory supervision of the state this industrial and economic development had as a natural sequence been extended to the agricultural industry of Pennsylvania. During the year 1927 rural extension lines involving an expenditure of $3,000,000 for the construction of 1441 miles of rural electrification and the connection of 17700 consumers were accomplished under the general orders and rules of the Public Service Commission.

IN Utah, savings to gas and electric consumers, owing to rate reductions ordered by the Public Utility Commission of that state, have amounted to approximately a million dollars.

IN Wyoming, a sparsely settled state, rate reductions during the last five years have saved electric and natural gas consumers $230,000.

YET these figures give only an indication—an illustration taken here and there—of what is being done by the Commissions for the public in the way of rate reductions. The savings over the entire country would run into a very high figure justifying our previous statement—millions and millions.

One of the important services of the Commission seldom thought of is the informal settlement of disputes between companies and their patrons, without loss of time and without the expense of litigation. This often includes adjustment of rate schedules downward as indicated with resulting savings to rate payers.

The New York Commission has said that no part of its work has given greater personal satisfaction to its members than the correction of personal and local grievances for which there was no adequate remedy until the enactment of the Public Service Commission Law; that the law has provided a forum into which individual complaints could be stated by the way of correspondence and relief afforded in proper cases without expense to the complainant and with little trouble. That there were but few localities in the state which had not at one time or another experienced the benefits growing out of applications to the Commission for the remedying of matters which were felt to be wrong and unjust.

IN one year the California Commission handled 3,232 informal complaints relating to reasonableness or correctness of rates of all classes of public utilities. Refunds for excessive charges, quality of service, extensions of service, resumption of service after discontinuance with consent of the Commission, safety and construction in operation of utility property, disposition of deposits made by consumers, compensations to be paid by electric utilities for transformers purchased by customers, and the maximum demand readings in connection

with electric service. In addition to that recommendations by the Commission looking for greater safety of service were made in approximately 3000 instances, over half of which the Commissions recommendations were carried into effect at the time the report was made.

THESE matters of rate regulation and the informal settlement of disputes constitute, of course, only a part of the valuable service rendered by the Commissions to the public. No mention has been made of the benefits resulting from the regulation of service, of securities, of accounting, or from the elimination of discriminatory practices or the prevention of waste due to the duplication of facilities; but enough has been said to show that Commission regulation is far from breaking down. On the contrary, the Commissions have done and are doing a splendid job for the public. When not interfered with by state or local politicians and when sufficiently financially supported, Commission regulation has worked effectively. The system is adequate for the protection of the public; and if the public can be made to see its value and support it, the rate payers will be properly taken care of in the matter of both rates and service. Investors, too, will receive fair treatment so that capital will be available for the constant needs of the public.

The preliminary period of expensive litigation for the establishment of guiding principles of regulation is about over. Already rate reductions brought about by Commissions through negotiations with the companies or voluntarily offered by the companies without the necessity of valuations or expensive litigation are becoming the rule. Any backward step now—any effort to cripple the Commissions—would be the height of folly.

THIS is looking at state regulation of utilities solely from the public standpoint. There are also substantial reasons why utilities form the present system of regulation, notwithstanding the benefits enjoyed by the public as the result of it. Both sides have profited, inconceivable as this idea is to some persons.

Nobody, of course, believes that Commission regulation is perfect, or that it cannot be strengthened or improved. But to assert that it has "broken down" is to misrepresent the facts. As stated by the California legislature the system has worked well. It should be strengthened.

"The world has learned that it can afford a certain amount of horse play in politics. It is awakening to the realization that it cannot have horse play in economics. The punishment is too quick and too severe. The tragedy which delights us on the stage of politics means real death and real tears when acted in the theatre of economics."

—OWEN D. YOUNG

How the "Factor of Economic Compensation" Works

By RICHARD LORD

As the population of our cities grows larger and their various economic structures become more complicated, interwoven and dependent, the element of neighborly reciprocity plays an increasing part in the solution of our municipal antagonisms. This element is called "the factor of economic compensation."

Suppose, for example, one of the numerous communities on the outskirts of New York city stands directly in the metropolitan path of a still larger suburb, so that the inhabitants of the latter use the little town's roads much more than its own people. Should the big town contribute anything to the little town road?

The matter of equalizing road maintenance has been taken care of by state and Federal aid to highway systems as well as by the gasoline tax. But a public utility serving such a metropolitan area is confronted with a more troublesome problem. It must assume the delicate task of distributing the rate burden equitably by adjusting rates to each community without offending the other.

A Kansas company has recently cut this Gordian knot by charging the same rates in each community. The city of Wichita has about a 100,000 population and suburban communities have a combined population of about the same number. Although the rates are uniform for the city and suburban communities, they are lower in Wichita than they are for the same service in cities of like size. The city, however asked for a reduction of rates on the theory that it is more thickly populated than the suburban town, thus making the cost of service less to the city than in the case of the smaller communities. The city urged that it was being discriminated against by the uniform rate. The Kansas Commission, however, held against the city on that proposition.

The problem of adjusting rates for various communities served by the same company without unfair discrimination is a difficult one. Where cities are widely separated and not dependent, one upon another, each should probably be considered as a separate unit for rate-making purposes. But where they form a group closely interdependent, it would seem that they might well be treated as a unit with uniform rates as was done in the Wichita case. The large city would seem to have little ground for complaint if its rates are lower as the result of the adoption of this policy, than are rates for similar services in places served independently.

Remarkable Remarks

HEYWOOD BROUN
Newspaper columnist.

"Since no man can divorce his political views entirely from self-interest, I must admit that I would rather be a wage slave under the administration of an Owen Young than take any chances under the presidency of Comrade Berger."

LOUIS D. BRANDEIS,
Judge, Supreme Court Washington, D. C.

"Public interest demands that, whenever possible, conflict between the two authorities and irritation, be avoided. To this end, it is important that the Federal power be not exerted unnecessarily, hastily or harshly. It is important, also, that the demands of comity and courtesy, as well as of the law, be deferred to."

CHESTER W. CUTHELL
New York attorney.

"I have no doubt that ten years from now there will be an Aviation Bar just as there is an Admiralty Bar, and that the law of aviation will develop quite in the usual routine. My hope is that we may not have to suffer in this struggling infant business with a multitude of laws conceived on different theories, lacking in uniformity in form and substance, and providing for Commissions and regulatory boards which can only serve to hinder rather than to help. I would like to see the State and Federal Governments confine their activities to the enactment of statutes that tend to increase the safety of the public in flying, but beyond that I hope they will let us alone."

GIFFORD PINCHOT
Ex-Governor of Pennsylvania, (in referring to a group of the power utilities).

"Two hundred million dollars a year of 'earnings' on pure water is such gigantic loot that no wonder the power monopoly stops at nothing to keep it."

DAVID MCCAHAN
Assistant Professor of Insurance, Wharton School of Finance and Commerce.

"Of all types of business, the two most apt to invite government control and government operation are public utilities and insurance."

FREDERICK W. CRONE
Of the New York Edison Company.

"Broadcasting has been carried on by utilities as just one more phase of their general good will effort. If, in the judgment of the utility, it is valuable, it is just as much a proper publicity expenditure as is institutional advertising in newspapers."

HON. JOHN E. CURTISS
Chairman, Nebraska State Railway Association.

"Can a (Federal) agency, located thousands of miles away, be fully informed on diverse climatic conditions, soil composition and storm areas, varying widely within the boundaries of a single state and all affecting the depreciation charges of public utilities? No, these and other difficulties make such regulation wholly unwarranted and impracticable."

THOMAS A. EDISON
Inventor.

"Water power is a political issue, not a business one. It can never at the best mean very much to us except as something to talk about."

MORRIS LLEWELLYN COOKE
Publicist and engineer.

"I realize, of course, that the public interest is never served when private interests are unfairly treated."

SAMUEL FERGUSON
President, The Hartford Electric Light Company.

"If customers could come and get power at the station, we would make a larger profit by giving them 20 K.W. hours for 40 cents, than we can by charging $2 for delivering the same 20 K.W. hours to their homes at the exact hour when they wish to use it."

MERRYLE STANLEY RUKEYSER
Financial writer.

"At present, as a result of the appreciation of values, most of the railroads are undercapitalized, instead of overcapitalized."

OWEN D. YOUNG
Chairman of the Board of Directors, General Electric Company.

"Who are the persons responsible for the right or wrong conduct of business? Two generations ago you would have said the owners, of course. Today, who are the owners of Big Business, of the telephone company, the steel corporation or the General Electric? The law says the stockholders are the owners; and that is true."

TOM P. WALKER
Vice-President, The Virginia Electric and Power Co.

"The group that is entirely dependent upon public transportation is growing smaller and smaller."

WALTER S. GIFFORD
President, American Telephone and Telegraph Company.

"There are two essential sciences to the utilization of nature by man. The first is discovered by studying nature. The second is discovered by studying man. After you have found out what you can do with nature, you then have to find out how to put that discovery to use for man. This second discovery is usually called business."

WALTER M. W. SPLAWN
Professor of Economics, University of Texas.

"It would be difficult to point to a single important invention or improvement, the introduction of which the world owes to a state railway."

THOMAS A. EDISON
Inventor.

"Of one thing I am more positive than I was even forty years ago—the electrical development of America has only well begun."

HARRY S. NEW
Postmaster General of the United States.

"Foreign governments of major importance are investing their money in the establishment of air mail lines to South American countries, for the purpose of capturing their trade. The United States must meet this competition or abandon all that commerce to others more enterprising."

ED HOWE
Sage and philosopher of Atchison, Kansas.

"German business men say Commissions and Congresses always give business the worst of it in contests with labor, and have appealed to the highest courts for relief."

MATTHEW S. SLOAN
President of the New York Edison Co.

"Because of what our service does in factories, mills, mines, building operations, the American workman has been released in very large part from muscular effort, and his working power has been vastly magnified."

PRESTON S. ARKWRIGHT
President of the National Electric Light Association.

"The earnings on the fair value of the property of electric light and power companies devoted to public service do not exceed six per cent. This is not a fair return, is not a full measure of all we are entitled to, and is not all the law allows."

LOUIS L. EMMERSON
Governor of Illinois.

"The purpose of public utility regulation is to provide ample protection for the public from exorbitant rates or insufficient or unsatisfactory service. This purpose is not served by hampering development of utility companies or preventing them from earning a fair return on investment."

SAMUEL FERGUSON
President, the Hartford (Conn.) Electric Light Co.

"You know enough of human nature to realize when you go into a restaurant and wish to receive the best possible service, that it would not be particularly helpful to begin by telling the waiter that his tip will be as small as decency permits, regardless of what he may prove able to do for you."

The Case of the Water Companies in a Nut-shell

The service of supplying water is perhaps the oldest form of public utility known to history. To obtain up-to-date information about the water companies in the United States today, this magazine recently sent a questionnaire to several of the more important representatives of the industry. The reply of Mr. Elliott was so comprehensive that it is here published in the original and terse form in which it was received.

—THE EDITOR.

BY E. C. ELLIOTT

VICE-PRESIDENT, FEDERAL WATER SERVICE CORPORATION, NEW YORK

1. *To what extent are water companies operated by private capital?*

According to the American Water Works Association, about 30 per cent of the water works of the United States are privately owned.

2. *In what states is the policy of private ownership most largely in operation?*

There are privately owned water works in practically all of the states. The states with the largest relative number of privately-operated plants include Pennsylvania, Alabama, New Jersey, New York, Illinois, and California.

3. *How far are these private companies under state regulation?*

Privately owned water works properties are almost entirely under state regulation.

4. *To what extent has consolidation or holding company management taken place?*

The grouping of isolated water properties into systems under centralized management has been an important development during recent years. The movement has been so broad in extent that probably the majority (and nearly all of the more important properties) of the privately-owned water works in the country are now units of one or the other of the holding companies.

5. *What was the first holding company in the waterworks field?*

As far as can be determined, the American Water Works & Electric Company was the first holding company in the water works field.

6. *What is the largest of the water holding companies?*

The Federal Water Service Corporation is the largest of the water holding companies.

7. *What are the advantages of the holding company in the waterworks field and what economies does it bring?*

Experience has demonstrated that the public benefits materially through

the grouping of independent water works properties under one ownership and management. The advantages which accrue are numerous; the four following are the major:

(a) Through ease of financing, the growth and expansion of cities is materially aided:

(b) Lower rates for service are made possible:

(c) A better quality of water is assured:

(d) A better and more constant service is furnished.

No city can become greater than its water supply. There is no exception to that opinion. It is of great importance, therefore, that the city's water supply grow with it. Small independent water works, standing alone, have had and are constantly having difficulty in financing betterments that are made necessary by the growing demands of the communities which they serve. In a great number of instances, the individual water company has found itself unable to meet the demands that are made upon it. In group ownership and operation, this problem is eliminated because of large credit facilities. Be the demands what they may—main extension, pump house improvements, water source developments or water treatment installations—the group system is able to finance them and to do so without delay.

Everyone knows that the amount of capital invested has a great influence upon the rate that must be charged. This is elementary, because every rate must provide for an adequate return. Under group management, engineering advice and supervision is available to individual properties and it is of such quality that the property standing alone could not afford to employ the counsel. Through this engineering device and supervision, plants are built and improvements and betterments are installed, logically and with economy, thus holding to the minimum the amount of capital necessary to invest in the property to produce the desired result. In the purchase and grouping of a large number of water works properties, large amounts of capital have at times been wasted; this waste has been traceable wholly to the absence of this skilled engineering advice which the holding company has available and gives to its various units at a minimum cost. It is demonstrated that lack of skill in operation is reflected in the rate that must be charged for service. This, of course, is for the reason that the rate must also produce an amount sufficient to pay operating expenses. If operating practices are not economical, everyone knows where the result is reflected. In group management, skilled and experienced executives are employed and operating expenses are held at the minimum, all of which is reflected in the rate for service.

The holding company organization has on its staff skilled sanitary engineers, bacteriologists, and chemists. The services of these men are available to the units. These experts are in constant touch with the quality of water produced in operation and furnished to the public, and the first sign of the presence of any suspicious element has immediate attention. In the small property operating alone, because of the impracticability of employing men of such skill, the quality of the water in almost every instance, receives but casual attention and then only by someone not thoroughly expert. The result has at times been disastrous.

8. *What service does it render?*

Because a holding company operates not alone in one community and because its very existence depends upon an accurate and satisfactory service to all the communities which it serves, it must establish a high standard of service and work to maintain in each property under its operation that standard. Those in charge

of the operation of the property have the responsibility of seeing that a constant service is maintained, and the ease of financing and the available engineering skill and technical advice reflect themselves in the accuracy of operation. In the holding company, the properties are operated by experts.

The grouping of water works and other utility properties under one ownership and management has shown a consistent and remarkable growth until now it has assumed great proportions.

The fact that investment in holding companies' securities has now come to be regarded as sound and conservative, and, therefore, desirable, demonstrates thoroughly the position group companies occupy in the public mind and is assurance that the movement is permanent.

9. *Are water companies interconnected like consolidated electric companies?*

Electricity can be stepped-up to an enormous "pressure," transmitted many miles and, by the simple expedient of a step-down transformer, the pressure can be reduced where desired. Water pressure, on the other hand, cannot be so easily controlled. Furthermore, water transmission line costs much more per unit than does electric. For these and numerous other reasons, it is not usually economical or desirable to interconnect water companies in the manner of electric companies.

Another reason for the interconnection of electric plants is the fact that hydroelectric power is available only at certain points; on the other hand, water supplies are usually to be found wherever needed.

10. *Could they be?*

Water companies could be, and occasionally are, interconnected. In a metropolitan district where there are numerous communities contiguous, it is feasible and even desirable to interconnect the water plant. Even in such cases, however, it is seldom that interconnection is carried on to the extent that it is in the electrical industry.

11. *What would be the advantages?*

The advantage of such interconnection would probably be in the nature of reduced operating costs. It might be that the investment in source of supply would be lessened.

12. *What progress has been made in the waterworks field as the result of holding company management?*

Very considerable progress has been made in the waterworks field due to holding company management. This progress consists principally in more efficient management caused by the elimination of duplication of properties, employees, and executives; the reduction of overhead charges and savings effected through large scale purchasing; plant improvements and additions as required; increased efficiency in financing; and improved operation and engineering methods.

13. *What has to be done to anticipate future needs and how far in advance must these be provided for?*

The company's engineers are continually planning for future requirements. These requirements, of course, will depend primarily on the growth of the communities served. How far in advance the requirements are provided for depends on the nature of the work. However, in installing any improvement in plant, it is usually attempted to provide for the growth during ten to fifteen years.

14. *Is there anything like research work in the water companies?*

Yes. While the research work of the water industry differs considerably in complexity from that of the electrical or chemical industries, nevertheless research work in the broader sense of the word is being carried on. The matter of ascertaining the best material to use and the best ways of doing things is being constantly studied; this applies not only to the operation and engineering department but to the financial, legal, accounting, and other departments as well.

15. *What is the outlook for future development?*

The outlook for future development of group management of water works systems is excellent.

A Unique Office as "People's Counsel"

SOME little time ago Congress created the office of "people's counsel" to represent the "public" in proceedings before the Public Utilities Commission of the District of Columbia.

By "the public," in this case, Congress evidently meant the rate payers. It was the intention that the people's counsel should be charged with the duty of safeguarding the interests of the rate payers just as the interests of the companies are protected by their own counsel.

In the early days of regulation there were Commissioners who seemed to think it was their duty to represent the rate payers in the same sense as a special counsel would be expected to look after their interests. This, however, was never the prevailing opinion. Neither the Commissions nor their counsel ought to be expected to act as special attorneys for either the rate payers or the corporations.

It is true Commissions are not exactly like courts which have to wait until controversies are brought before them and then pass judicially upon the question raised. As an arm of the legislature, it is part of the Commission's duty to investigate existing conditions on their own initiative and to alter them if they find they are not what they should be. But in any event, when a Commission acts, whether on its own motion or in response to a complaint, it acts not as a special counsel for a particular party but for the people of the entire state who are interested in having disputed questions with reference to public utility service and rates settled in an equitable way. The Commission should not be partisan.

It is different with the people's counsel. As he represents the rate payers—one of the parties to the controversy—he may be as partisan as he pleases with entire propriety.

Public Utility Regulation in Connecticut

By RICHARD T. HIGGINS, Chairman

Some of the Unusual Features of the Connecticut Commission—

It has no jurisdiction over the capitalization and issuance of securities of utility companies, except in special cases by charter provision:

It has no jurisdiction over municipally-owned utilities excepting as to standards of electric line construction and to the requirements of annual reports on a uniform system of accounts:

Since the establishment of the Commission in 1911, the original act has been amended to define and limit the terms "public service company" to include only those specified in § 3610 of the General Statutes.

The Public Utilities Commission of Connecticut was created by virtue of an act of the General Assembly in September, 1911. This new Commission superseded the Railroad Commission, but in addition to the authority possessed by the former Commission, it was vested with broad powers and duties pertaining to the regulation and supervision of all public utility companies.

This Commission, unlike some other Commissions, has no jurisdiction over the capitalization and issuance of securities of utility companies, except in special cases by charter provisions.

The Commission has no jurisdiction over municipally-owned utilities excepting as to standards of electric line construction and excepting as to the requirement of annual reports on a uniform system of accounts prescribed by the Commission. There were this year, in addition, thirty-one municipally-owned utilities; of this number twenty-five were water companies.

In the year 1928 there were 189 public service companies, consisting of railroads, street railways, express, telegraph, telephone, water, gas, and electric companies, all subject to the jurisdiction of and reporting to the Commission. There were also fifty-seven certificate holders operating 1870 road miles of motor bus service in the state.

SINCE the establishment of the Public Utilities Commission few material changes or amendments of the creating law have been passed. One of the amendments of interest was the change in the provision as to common carriers.

The original act defined the term "public service company" to include "all common carriers." It was found that a broad interpretation of the words "all common carriers" would include livery stables, taxi service, steam and motor boat service, and other forms of transportation which would come within its meaning, although probably not so intended by the legislature. Therefore, the act was amended in 1917 by eliminating that phrase and specifically defining and limiting the terms "public service company" to the companies enumerated and now appearing in § 3610 of the General Statutes.

Other amendments have given the Commission jurisdiction over the sale, merger, or consolidation of utility companies, over jitney or motor bus service for the carriage of passengers over regular routes, over the modification of the terms of a charter or contract fixing rates, and over uniform accounting by public utilities.

THE Commission is composed of three members, and at the present time there are sixteen employees who are, by training and experience, experts in their particular field of work. The work of the Commission, in addition to the matters demanding the immediate and personal attention of the Commission, is classified and subdivided among the following integral departments: legal, engineering, accounting, jitney or motor bus, secretarial and clerical.

There are presented to and heard and decided by the Commission annually an average of 450 formal petitions that involve many questions, such as rates and service, grade crossing eliminations, mergers and consolidations, and approval of electric and other constructions. In each case the Commission makes a complete record and finding of the facts and conclusions upon which it bases its decision. The greater part of the Commission's time is occupied, however, with informal complaints, correspondence, and conferences with company officials and patrons.

There are no prescribed rules of procedure, and any matter proper to be considered by the Commission may be brought to its attention in the simplest manner consistent with statutory requirements. In each case the Commission makes a complete record and finding of the facts and conclusions upon which it bases its decisions. The practice has grown up on the part of utility companies, before attempting to make any material change in their business or policy, of consulting with the Commission regarding such changes, and regarding their operations generally, so that the Commission has become in a measure not only a regulatory but also an advisory board. This practice tends to eliminate many complaints and is said to work for the benefit of all parties in interest.

IT is interesting to note that of the several thousand cases heard and decided by the Commission on formal petitions since its creation, only

eight cases have gone to the Supreme Court, and in only two instances, has the decision of the Commission been reversed. In one of these cases there was a majority and minority report by the Commission. Of the limited number of appeals to the superior court, exclusive of the Supreme Court cases mentioned, only four decisions of the Commission were reversed or modified by that court.

As in the case of most Commissions, the two fundamental questions in utility regulation that most vitally affect the general public are adequate service and reasonable rates.

The Commission usually handles questions affecting service informally; its suggestions or recommendations are generally accepted by the utilities as equivalent to an order based upon a formal petition. In this way speedy relief is many times effected without the delay and expense that are incidental to a formal petition and hearing.

RATES are of two kinds: company-made rates and Commission-made rates.

Upon the inauguration of the Commission plan of regulation, all utility rates were company-made, but since that many of those rates have become Commission-made. Company-made rates are subject to change by the company without first going to the Commission. Commission-made rates cannot be increased by the company above the prescribed maximum without authority from the Commission after a hearing. Either rate is subject to review and change by the Commission upon written petition under the statute, and the presentation of such petition is necessary to clothe the Commission with its jurisdiction to change or prescribe rates. A greater degree of formality is followed in rate making than in other cases, although no technical or prescribed form of petition is required other than an allegation in conformity with the statute. Written answers or subsequent pleadings are not usually required, nor are strict rules of evidence observed, although they are observed more strictly in rate cases than in most other cases.

THE Commission has no jurisdiction over the sale of stock in the open market; the whole or a majority of such stock may be procured by either foreign or domestic interests, thereby creating in the purchasing company control over the operations and managerial policies of the utilities so purchased. This, while not an actual merger or consolidation, may remove local interest and control without the assumed corresponding advantages of economy of operation under one corporate management. The actual corporate merger or consolidation of utility companies, however, is subject to the approval of the Commission. There must be stated in a merger or a consolidation to be approved by the Commission, the purpose, terms, and conditions thereof, which should show the practical economic advantages to the company and its patrons, and that the financial consideration or capitalization does not exceed a conservative fair value of the property involved.

THERE used to be a large number of individuals who operated unregulated motor busses when the "jit-

ney act" was passed in 1921; the number probably ran between one thousand and two thousand. These operated principally in the cities. Most of these vehicles were small cars, in varying degrees of repair, operated over such routes and at such times as were most convenient for the fancy of the operator. They carried no insurance or other form of protection to idemnify against injuries to passengers.

There has now developed under the regulation of the Commission, however, a state-wide and reasonably dependable motor bus transportation service, supplied on convenient and regular schedules in easy riding and comfortable busses or coaches of the latest type. A complete set of rules covering motor bus operation has been prescribed by the Commission, and this includes requirements of safety devices in construction and type of bus.

THE entire expense of maintaining grade crossing protection in the state of Connecticut is borne by the railroad companies. The engineering department of the Commission has made careful surveys, photographs, and reports of conditions at every grade crossing in the state, and has classified them according to the degree of danger they represent. A gradual elimination of grade crossings has been carried on, but this is necessarily a slow and expensive process, and the installation of some form of protection at existing crossings is required in order better to safeguard the increasing and swiftly moving highway traffic.

No new highway may be constructed across a railroad at grade with the tracks, and no new railroad can be constructed across a highway at grade, except commercial sidetracks which may be authorized by the Commission.

In the annual report of the Railroad Commissioners, January 1, 1884, it appeared that there were at that time 1223 railroad highway grade crossings in the state, and the records of the Commission at the present time show 703 grade crossings, of which 34 per cent are protected by gates, flagmen, or automatic signals. The average cost, under present-day prices, of eliminating a single grade crossing is said to be upwards of $100,000, exclusive of crossings in the cities, where the expense is considerably more.

Big Business and the Public Conscience

TWENTY or twenty-five years ago, business sought to run its own affairs regardless of the public. The reaction was the muck-raking period, in which a multitude of sins were, justly and unjustly, laid to the charge of the interests. In the face of an aroused public conscience the large corporations were obliged to renounce their contention that their affairs were nobody's business. If today big business were to seek to throttle the public, a new reaction similar to that of twenty years ago would take place and the public would rise and try to throttle big business with restrictive laws. Business is conscious of the public's conscience. This consciousness has led to a healthy co-operation.

—EDWARD L. BERNAYS

The Tendency of Utility Rates in Washington Is Downward

Corporation Counsel J. L. Kennedy, of Seattle recently stated that the effect of rate-fixing activities by the Department of Public Works of the state of Washington had been to raise, rather than to lower the costs to the consumer. This magazine promptly, in the course of its investigations, asked the Department of Public Works for a statement of fact. Its reply, signed by the three members who constitute the Department, is so unusual that it is here published in its entirety. It has been prepared from the official records of the Department from December 1, 1924, to January 1, 1929.

—THE EDITOR.

As a matter of public record, the state regulatory body of Washington has consistently denied applications for increases in rates to public utilities operating in the state of Washington.

This statement is not made by the Department in the spirit of boasting, but is based upon the records in cases coming before the Department.

The principal reason for the justification of the Department in consistently denying applications for increased rates and requiring the reduction in rates of public utility companies, is due to the general growth of the state, the increase in population, which increases the density of traffic, and the improved methods of generating and/or production of public service to the patrons of public utility companies.

The gas, water, electric, telephone, and telegraph companies that furnish service to the public for hire came into existence as public utility companies in the state of Washington by an act of the legislature during the year 1911. As public utility companies, operating under the Public Service Law of the state of Washington, these industries immediately subjected themselves to operate under state regulation relative to their rates, service, and facilities. The state legislature of Washington clearly and fairly provided that state regulation must and shall apply to only the rates, service, and facilities of public service companies, and very wisely and definitely stated that state regulatory bodies shall not in any sense assume managerial responsibility of public service companies.

IT has been contended that state jurisdiction of rates, service, and facilities is so closely related to the

management of public utilities that it is not practicable to precisely establish a definite line between the two. However difficult it may be to separate these two, it is most essential that state regulatory bodies give the benefit of any doubt in favor of a plan that will insure a complete severance of any design of the regulatory body toward managing public utility companies. It is dangerous indeed for state regulatory bodies, as at present constituted, to attempt to assume managerial duties of public service companies in competition with the owners and managers of the companies who have devoted (in most cases), many years in the study and operation of the respective service industry.

The success of public service companies will continue just as long as the companies recognize that the fundamental purpose is to furnish adequate service to the public at reasonable rates under state supervision.

COMPLAINTS filed with the Department based upon inadequate service furnished, or upon the excessive charges assessed, or relative to discriminatory practices, are in the interest of promoting efficiency of operation of public service companies. Such complaints assist the Department in its supervision of rates, service, and facilities. Further, they encourage the public utility companies to improve service and they tend to reduce rates. However, complaints filed with the Department based upon agitations arising from individuals for the purpose of advancing political interests or based upon conditions arising from unpleasant personal relations, purely in the spirit of revenge between the personnel of the utility and the public, are injurious to the interest of the patrons of the utility and to the efficiency of the utility and must be discouraged by the state regulatory body.

Seldom is it necessary to serve complaints regarding service upon the larger public utility companies of this state. The patrons have themselves established a standard of service relative to gas, water, electric, telephone, and telegraph operations; this standard is recognized by the utility, and an effort on the part of the utility has been successful in maintaining such standards of service.

The problem before the Department today is in establishing fair, just, and reasonable rates for services rendered and to eliminate any existing discrimination, and to avoid discrimination in the future.

IN the proper determination of rates the Public Service Laws of the state of Washington provide and the courts have sustained that one of the fundamental elements considered in rate making is the establishment of a rate base known as the valuation of the utility's property used and useful in furnishing service to the public. The valuation represents the amount of capital prudently invested as found by an appraisal of the physical property required for the proper rendering of service.

Using this value as a basis, and determining, as a result of investigation, proper amounts for operating expenses, taxes, and depreciation of physical property, it is then merely a mathematical problem of fixing a rate

to be charged by the utility which will permit it to earn a reasonable profit and allow the public to continue the use of the service.

It is often alleged that public utility companies operating under state supervision are free from competition and, therefore, have a monopoly in their respective districts.

As a matter of law, this assertion is without foundation. As a matter of fact, competition does and will continue to exist.

As a matter of law, no provision exists in the state of Washington to prevent one or more public utility companies to invade the territory that is being served by one or more public utility companies. Indeed, any public utility company that is successful in obtaining a franchise for the erection of its facilities over the state highway, county roads, or streets of a city, town, or district, may enter into competition at any time. It is purely a matter of form in securing franchises over state highways and county roads, with practically no expense or work involved.

Several sections of the state of Washington at this time are being served by more than one public utility company that furnishes the same service. As a matter of fact, and as an illustration, several of the larger electric utility companies of the state of Washington are keenly aware of the fact that the rates of their respective companies are fixed by the schedule of rates that apply in territory adjacent to their own. It is practically necessary that the rates that apply in the vicinity of the boundary line separating two or more public utility companies that furnish the same character of service be identical, or at least comparable; otherwise the patrons of the utilities might well allege and prove discrimination. This condition, as it exists in the state of Washington justifies the contention that competition in rates really exists in territory adjacent to boundaries between public utility companies. This being true, the district immediately adjacent to the district on the boundary line might also, and in many cases does, allege discrimination in rates between the two districts. There is, consequently, no limit to the number of districts in a territory that is served by public utility companies which allege and prove discrimination.

This process of reasoning might be termed visionary if it were not based upon the actual records of the state regulatory bodies. The discrimination referred to is not confined to rates only but also involves character and types of service.

Another form of competition in the state of Washington is municipal ownership and mutual ownership of plants that furnish service to the public.

Statistics on file with the state regulatory body, resulting from many years of investigation by experts who are particularly qualified for such work, conclusively prove that public service as now furnished to the people of the state of Washington under existing conditions is to the best interest of all concerned.

Public service to the people of the state of Washington without state regulation would be unsatisfactory to

the patrons of public service companies, unfair to capital invested in public service, and not for the best interests of the state of Washington. A public utility operates primarily for profit; to insure its success in rendering a public service it is absolutely essential that it obtain the co-operation from its customers, precisely as customers furnish business to any other privately owned and regular commercial enterprise.

BASED upon past performance, it is conceded by those competent to analyze the accomplishments that state regulation of public utility companies has been successful. State regulation could be exercised more efficiently by further state legislation, authorizing jurisdiction over such matters which the Federal Government is now contemplating to assume. Should the individual states fail to appropriate to themselves proper jurisdiction relating to regulation, then Federal jurisdiction is assumed.

Individual states are, by virtue of geographical location and by their intimate knowledge of local conditions, better equipped to have jurisdiction over public utility companies than any Federal authority now in existence. The Government at Washington, D. C., is already so overloaded with affairs that it cannot even now do justice to the great diversity of local interest in this country. It is physically impracticable for the Federal Government to regulate public utility companies as efficiently as the individual states can do it for themselves. However wise, however powerful the Federal Government may be, it is a mistake to substitute Federal regulation in the place of state regulation of our public utility companies.

HERE is a list of cases that show the determinations by the Department, after considering all evidence submitted at regular formal public hearings.

In Cause No. 6158, involving the application of the communities of Brown's Point and Dash Point, suburbs of Tacoma, the plea for the elimination of toll charges for telephone service, was, after regular hearing before the Department, granted. The granting of the petition of the patrons of the telephone company resulted directly in a decrease of telephone rates and provided more adequate service.

In Cause No. 6163, the North Bend Heat, Light, Water & Power Company applied to the Department of Public Works for an increase in rates for water service. The town of North Bend protested against the proposed increase and, after a regular formal hearing, the petition for increased rates was denied.

In Cause No. 6149, the Republic Water Company applied to the Department for increased rates. After consideration by the Department of all facts presented, the Republic Water Company was denied increased rates.

In Cause No. 6071, the city of Deer Park alleged that the Mount Spokane Power Company was assessing excessive charges for electric service. After regular hearing, the Department reduced the electric rates applying in Deer Park and vicinity, and also required the utility to improve the service to the public.

In Cause No. 6081, the town of Asotin petitioned the Department for a reduction in water rates. The Department issued its order reducing the rates 21½ per cent.

In Cause No. 6096, the town of Chinook filed a complaint that alleged inadequate water service for fire protection. The Department, on its own motion, challenged the rates and an order issued by the Department after regular hearing provided for not only an improvement in the service but required the water company to furnish free all water for fire protection purposes.

In Cause No. 6130, the town of Morton petitioned the Department for a reduction in electric rates. After regular hearing, at which all evidence was considered, the Department reduced the electric rates.

In Cause No. 5689, the cities of Yakima and Walla Walla, together with some thirty-seven other towns and six counties, filed a complaint with the Department, alleging that the Pacific Power & Light Company's rates for electric service were excessive. As a result of a hearing held for the purpose of establishing a valuation of the company's property used and useful in furnishing service to the public, the Department in its order eliminated $1,117,000 from the rate base upon a valuation of approximately $6,000,000. This case was appealed to the superior court of Thurston county and the Department's order was reversed. On appeal to the supreme court, the order of the Department was sustained. Due to litigation in the courts, relative to the valuation proceeding and on account of the delay in filing briefs in the rate hearing of this proceeding, the Department's order has not been issued fixing fair, just, and reasonable rates. However, since the complaint was filed with the Department, the electric company has voluntarily reduced the electric rates in the Yakima-Walla Walla district amounting to $375,000 annually.

In Cause No. 5896, the Puget Sound Telephone Company filed a tariff with the Department providing for an increase in telephone rates in Everett. During the investigation by the Department prior to the holding of a hearing, the telephone company withdrew its application for increased rates so that the old rates are now in effect in Everett.

In Cause No. 6099, the Farmers Mutual Telephone Company applied to the Department to abandon an exchange at Maple Falls, which would have had the effect of increasing rates in that district. The application was denied by the Department and the old rates now prevail.

In Cause No. 5344, the Pacific Telephone & Telegraph Company filed tariffs providing for increases in rates applying in Seattle, Tacoma, and Spokane: as a result of a complete investigation by and hearing before the Department, the application for increased rates was denied by the Department. This case was appealed to the Federal Court, which granted the electric company authority to put into effect the proposed increased rates.

In Cause No. 5804, the town of Shelton filed a complaint with the Department alleging that the electric rates in Shelton were excessive. Upon the record in this case at a regu-

lar hearing, the Department ordered a reduction in rates and reduced the rate base from $225,000 to $81,253.

In Cause No. 5955, the Western Union Telegraph Company applied to the Department for an increase in press-rate messages. The proposed increase affected practically every city and town in the state. After regular hearing, the Department denied the telegraph company's application for increased rates.

In Cause No. 5958, the town of Easton filed a complaint alleging excessive charges for water service. After regular hearing the Department ordered a reduction in rates.

In Cause No. 6126, the Hoods Port Water Works petitioned the Department for an increase in rates. As a result of a hearing, the application of the water company was denied.

In Cause No. 5847, as a result of a complaint filed by the city of Spokane, the Department, after holding a regular hearing, reduced the rates in gas in the city of Spokane as furnished by the Spokane Gas & Fuel Company.

In Cause No. 5707, the Skagit Valley Rural Telephone Company applied to the Department for long distance connection with the Pacific Telephone & Telegraph Company. The granting of this application had the effect of affording more adequate telephone service at less cost to the patrons. After hearing the Department ordered physical telephone connection between the two companies. This case was appealed to the court and the Department's order was reversed.

DEPARTMENT OF PUBLIC WORKS

John L. Denney

Director.

C. W. Re Moore.

Supervisor of Public Utilities.

James R. Neal

Supervisor of Transportation.

When the Customer May Get His Deposit Back

WHEN *a company has lawfully retained a deposit from a consumer who has failed to establish his credit, it is not required to charge subsequent bills against the deposit until it is exhausted. The company may, under such circumstances, insist that when an overdue bill is charged against the deposit, that payment be made to restore it to the original amount. It has been held by the New Jersey Board, however, that the consumer, by prompt payment within the time limit during the succeeding two years, might establish his credit with the company, and be entitled to a return of his deposit with interest.*

Hon. Richard T. Higgins

Chairman of the Connecticut Public Utilities Commission

HONORABLE Richard T. Higgins, who is now Chairman of the Public Utilities Commission of the state of Connecticut, was born at Washington, Connecticut, September 24, 1865. He is the son of Edward and Mary Higgins. When he was four years old he moved with his parents to Woodbury, Connecticut, where he was reared on a farm near the town. He pursued his early education in the public schools; later he became a student in the Parker Academy, from which he graduated with the class of 1883. He afterward received his collegiate education in St. Francis' College in New York city. Following a course of law study in the office of Huntington & Warner, of Woodbury, he was admitted to the bar in May, 1890.

In January, 1891, Commissioner Higgins opened a law office in Winsted, where he has since actively engaged in practice, and where he has occupied a prominent position in legal circles for a quarter of a century. He was appointed coroner for Litchfield county in 1892—an office which he held until he resigned October 1, 1910. He was prosecuting officer of the town of Winchester, Connecticut, from 1902 to 1904 and corporation counsel of the town of Winchester from 1900 to 1912; he was also chairman of the school committee in Winsted for two years.

COMMISSIONER Higgins was elected a representative from the town of Winchester as a member of the lower house of the Connecticut Legislature during the session of 1909, where he occupied the position of Democratic floor leader. On October 1, 1910, Governor Weeks appointed him as a member of the Connecticut Board of Railroad Commissioners; he became Chairman of that Board in February, 1911. In September, 1911, the Board of Railroad Commissioners was superseded by legislative enactment, and the Public Utilities Commission was created. Governor Baldwin appointed Mr. Higgins a member and Chairman of this new Commission. He has held this position by successive appointments up to the present time.

Commissioner Higgins, upon recommendation of the Governor of Connecticut, was appointed by President Woodrow Wilson a member of the local exemption board for Division No. 19 of Litchfield county, and was later made its chairman. After the work of the first draft was practically completed in September, 1917, he resigned, owing to the press of work in his office at the state capitol.

IN addition to his activities as a public officer, Commissioner Higgins has been president of the Winsted Chamber of Commerce, exalted ruler

of the Elks lodge (in which he holds a life membership), grand knight of the Knights of Columbus, and a member of the Ancient Order of Hibernians; he is also a trustee of the Litchfield County Hospital, a member of the Winsted Club, of the Greenwoods Country Club and the Fraternal Benefit League, of the Litchfield County Bar Association, and the American Bar Association.

Commissioner Higgins married Miss Margaret R. Bryan September 1, 1898; they have a son, Bryan Edward Higgins. In September, 1920, Mr. Higgins' wife died and in July, 1923, he married Miss Margaret B. Noonan of Hartford, Connecticut, since which time they have resided in West Hartford, Connecticut.

Just What *Is* a "Public Utility"?

"FATHER, what is a public utility company?" asked a youthful son at the breakfast table.

"Why do you ask?" remarked Dad, looking up from his newspaper.

"I was talking about you to the boys yesterday and I said you were president of a utility company and they asked me what a utility company is, but I couldn't tell them."

"Well, I am president of an electric company. That is a public utility corporation. A telephone company is a public utility and so is a gas company, a water company or a railway company. Anything like that is a public utility."

The public utility magnate in this case "got away with the matter," as the saying is, but manifestly he did not define a public utility. He had really been asked an embarrassing question.

There are many persons who think they know what a public utility is, but chances are they are mistaken. If anyone can draw up a water-tight definition of a public utility, he will confer a lasting benefit upon Congress and the legislatures of the various states. Such a definition would even be of great use to the Supreme Court of the United States, which is called upon occasionally to answer that question.

If you have a little spare time on your hands, you might try your skill on it. As a suggestion, you might start in by asking yourself why a telephone company is regarded as a public utility. After you have settled this to your satisfaction, you might proceed by asking if the same reasoning applies to a radio broadcasting company or to a newspaper, or to a coal company or to an ice company.

If you will do this you will probably come to the conclusion that the question "What is a public utility?" belongs to that large group of questions which are easy to ask but hard to answer.

Why the State Commissions Keep an Office in the Capital

1. *To meet the necessities produced by the concentration of governmental powers in Washington:*

2. *To preserve the present powers of State regulatory agencies from further encroachment:*

3. *To co-ordinate the action of State and Federal Commissions for the purpose of eliminating friction and of increasing their efficiency.*

By JOHN E. BENTON

GENERAL SOLICITOR, NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

The Washington office of the National Association of Railroad and Utilities Commissioners is maintained by the regulatory Commissions of the several states for their convenient representation in Washington, mainly upon matters pending before the Interstate Commerce Commission.

In practical effect, this office is a branch office of each of the forty-eight State Commissions.

This office was made necessary, and was brought into existence, as a result of the changes in Federal legislation and Federal administration, which took place during and immediately following the World War. The State Commissions maintained an office in Washington before the war began, but it was designed to serve a single temporary purpose. State Commission representation in Washington, however, began with that office.

It is interesting to note how completely the personnel of the regulatory Commissions, both Federal and State, has since changed, and how questions believed of paramount importance at that time have become of relatively little importance now.

The writer became a member of the New Hampshire Public Service Commission when that Commission was first created in 1911, and first appeared at a meeting of the National Association of Railroad and Utilities Commissioners in Washington in October of that year. Of the 172 Commissioners who now compose the State Commissions, only five were Commissioners then. They were Hon. Daniel Boyle of Montana, General Harvey H. Hannah of Tennessee, Hon. Richard T. Higgins of Con-

necticut, Hon. William T. Lee of North Carolina, and Hon. John F. Shaughnessy of Nevada.

Of the Interstate Commerce Commissioners no Commissioner in service now was on the Federal Commission then. The two oldest present Commissioners, in point of service, were then serving on State Commissions. They were Hon. Balthasar H. Meyer of Wisconsin and Hon. Clyde B. Aitchison of Oregon.

THE subject which most engaged the attention of Commissioners at that convention of 1911 was valuation.

The Minnesota Rate Cases were then pending in the United States Supreme Court. Those cases involved appeals taken by the state of Minnesota from injunctions granted by Judge Sanborn in the United States District Court in Minnesota restraining the enforcement of rates prescribed by Minnesota law. The ground of attack made upon the Minnesota rates in those cases was confiscation. It was through the courts only that the exercise of the power of a state over rates for service performed wholly within its borders could be hindered,—or at least this belief was then entertained. Rates which failed to yield a fair return upon the value of property devoted to the performance of the service for which the rates applied were, as the courts held, confiscatory, and violative of the Fourteenth Amendment; but otherwise state power was supreme in the state field, or was supposed so to be.

IN the Minnesota Rate Cases, the state of Minnesota, to meet the attack of the railroads and their showing of the value of their lines in Minnesota, had been obliged to make a valuation of practically all the railroad property in the state. This had cost a great sum, and the preparation and trial of the case had covered several years. And the state's defense in the District Court had been unsuccessful.

While it was believed, as just stated, that the power of the states to regulate rates for transportation wholly within their own borders was wholly beyond restraint by the Federal government, except through the courts upon the ground of confiscation, the danger of serious curtailment of such power through the courts was a grave one. In rate litigation the railroads were able to spend whatever sums they might wish to spend for valuation experts and for other valuation purposes. The State Commissions, on the other hand, were ordinarily ill supplied with funds. It was obvious that in the field of valuation they would always be at a disadvantage. The experience in Minnesota and in Oklahoma and elsewhere proved this.

THE Interstate Commerce Commission had long been recommending to Congress the enactment of legislation to provide for a valuation of the railroads of the country. These cases, and the difficulties with which state authorities struggled in attempting to make defense of their rates when attacked in the courts, aided greatly towards bringing about the enactment of the Valuation Act two years later, in 1913. State Commissioners generally favored that act,

and when it had become law they took an immediate and lively interest in the work of the Interstate Commerce Commission in the administration of it.

The State Commissioners were anxious to have the act passed, because they felt themselves largely helpless to meet excessive claims as to values presented by the carriers' experts in the courts. They wanted an authoritative valuation of all railroad properties made, which should be available for use by any state without cost; and they wanted the value of each road divided and reported in such fashion that the value of its property in any state would be shown separately from the value of its property in other states. This was necessary in order that such values might be usable for state rate-making purposes, and in court in defense of state made rates.

This last mentioned matter, as was supposed, was taken care of in the Valuation Act as passed, which provided that the Commission should "show the value of the property of every common carrier as a whole, and separately the value of its property in each of the several states."

THE law having been enacted, the State Commissions wanted to insure that it should be so administered that excessive values should not be fixed, and the rate-making powers of the Commissions thereby unduly limited. Accordingly, in 1915, at the annual convention of the National Association in San Francisco, a resolution was adopted authorizing the Committee on Valuation to employ counsel to represent the State Commissions in valuation proceedings before the Interstate Commerce Commission. The purpose was to keep before the Interstate Commerce Commission a representative who could press upon that Commission the views of the states as to the principles and methods of valuation which should be applied.

The committee employed Mr. Aitchison, then Chairman of the Public Service Commission of Oregon, as its representative in Washington, and he resigned from the Oregon Commission, and opened his office in Washington in May, 1916. This was the beginning of State Commission representation in Washington.

Mr. Aitchison did not come to Washington as General Solicitor of the National Association of Railroad and Utilities Commissioners, nor as the general representative of any State Commission. He came instead as the Solicitor for the Valuation Committee of the National Association, and his duties, throughout his term of service, were in respect to railroad valuation proceedings only.

After sixteen months' service Mr. Aitchison was appointed Interstate Commerce Commissioner. To succeed him the committee employed Mr. Charles E. Elmquist of Minnesota, who two years before had offered the resolution at San Francisco under which the Washington office was established.

Mr. Elmquist also came to Washington as Solicitor for the Valuation Committee, for the sole purpose of representing the State Commissions in valuation proceedings. In the meantime, however, something had happened which was destined to change

the situation almost completely, and to make necessary a bureau in Washington through which the State Commissions might have representation, for reasons quite aside from valuation.

IN 1912 the Interstate Commerce Commission had decided the Shreveport case. For twenty-five years, after the Act to Regulate Commerce was enacted, it had been supposed that it left state powers to regulate intrastate rates untouched. The first section of the act contained express language as follows:

> ". . . the provisions of this act shall not apply to the transportation of persons or property . . . wholly within one state."

In the Shreveport case, decided by the Interstate Commerce Commission in 1912, and affirmed by the United States Supreme Court in 1914 (234 U. S. 342) it was first discovered that the words just quoted from the first section of the act did not mean exactly what they might at first glance seem to mean. They did not prevent the application of the anti-discrimination provisions of the third section of the act to make unlawful discriminatory intrastate rates. Under the third section, notwithstanding the language of the first section, the Interstate Commerce Commission was able to authorize and require the railroads to disregard intrastate rates prescribed by state law. This was established by the Shreveport case.

That case caused much discussion, and some concern among State Commissioners. When it was decided, however, I doubt if the most far sighted perceived the length to which the Federal power would be carried upon the basis of the principle which it laid down. That case, and what ultimately grew out of it, played a large part in the transformation of the Washington office from what it was when established to what it is now.

MR. Elmquist was appointed Solicitor for the Valuation Committee in September, 1917. He came to Washington in the midst of war. The Government shortly took over the railroads and then the telephone and telegraph lines. The express companies were consolidated, and in effect taken under Federal control also.

Immediately questions arose as to the relation of State Commissions to these properties, which, in their intrastate operations, had been subject to their jurisdiction, and as to whether state laws and Commission orders, continued in force during Federal control.

The 1917 convention of the National Association had authorized the appointment of a special war committee to confer with Federal authorities on matters arising out of the war. Because he was in Washington, and especially well fitted to represent the State Commissions, Mr. Elmquist was seized upon, and made the secretary and spokesman of this committee. So he became in effect the agent of the State Commissions in Washington on all matters concerning the railroads, the wire companies, and other public service properties. This work absorbed most of his attention.

Through Mr. Elmquist the cooperation and services of the State Commissions were tendered to the Director General, Mr. McAdoo, immediately after the rail carriers were

taken over. Later, when the wire companies were also taken over and placed in the hands of the Postmaster General, Mr. Burleson, a like tender was made to him. Mr. McAdoo and Mr. Burleson soon made it evident, however, that they would neither use the State Commissions as their agencies, nor recognize them as any longer possessing any powers of regulation over the properties which were under Federal control. The former operating officials of these properties, clothed now with Federal power, quickly carried this policy into action.

The State Commissions thus found the properties which they were created to regulate suddenly snatched away from them.

It was among State Commissioners generally believed that the legislation under which these properties had been taken over by the Federal government had been designed to preserve state regulatory powers. Some believed that the states had constitutional powers which could not be taken away, regardless of the intent of the legislation. It was, accordingly, concluded that the courts should be asked to determine the extent to which state laws and State Commission powers had been abrogated. Actions in court followed—as to railroad rates, with the Director General, and as to telephone rates, with the Postmaster General. Mr. Elmquist played an important part.

The decisions went against the State Commissions.

When the war ended there was proposed reconstruction legislation in the form of various acts introduced in the House and Senate from which finally came the Transportation Act. It was clear that the legislation which would be adopted would vitally affect state regulation. The State Commissions needed to be represented. Mr. Elmquist, being on the ground, was used. So he became in effect the Washington correspondent or attorney of the State Commissions generally. At the 1918 convention of the Association this situation was recognized, and he was made the General Solicitor of the Association, and it was by resolution provided as follows:

> "Upon request of State Commissions, he shall appear for them before Congressional or other committees and shall take up with Federal officers, departments, Commissions, bureaus and the various agencies of the Federal Government such matters as may be requested by the committees of this Association or by the State Commissions."

It was in this manner that the Washington office of the National Association of Railroad and Utilities Commissioners as now constituted came to be established.

The period following the War was rather hectic. When the Transportation Act was taking shape the railroads had sought to obtain the inclusion of provisions which would enable the Interstate Commerce Commission to increase intrastate rates found by it to be so low as to cast an undue burden on interstate commerce. Mr. Elmquist and the State Commission representatives acting with him had vigorously opposed this. They appeared to succeed, without succeeding.

The "undue burden" provision was struck out of the bill, but in place of it was put a provision enabling the Commission to prescribe intrastate rates which it might find to cause any undue preference or advantage as between persons or localities, or any undue discrimination against interstate commerce. This, it was claimed by the authors of the bill, was intended merely to perfect the Commission's means of exercising its previously existing power. Under the law, as it previously existed, the Commission, on finding undue discrimination, could require its abatement. Its order could release a carrier from observing intrastate rates prescribed by state authority, but could not prescribe the rates to be substituted.

SUBSEQUENT history is familiar. The Interstate Commerce Commission, under that new language, claimed the power to revise intrastate rates which it found to be so low as to interfere with the earning of a fair return by the carriers. It held that such rates constituted an "undue discrimination," and were prohibited by the amendment. There was much litigation before the Commissions and in the courts. Finally, in the Wisconsin Rate Case (257 U. S. 563, P.U.R.1922C, 200, 42 Sup. Ct. Rep. 232) all the claims of the Interstate Commerce Commission were sustained.

IN that case it was held by the court that not only may the Interstate Commerce Commission revise the intrastate rates of a carrier for the purpose of bringing them to a level corresponding to the level of interstate rates, but that in determining this level it is not necessary to make any separation as between the value of property devoted to intrastate traffic and of that devoted to interstate traffic. With that decision, the old-time state rate case, with its valuation of railroad properties within the state, and its segregation of the value of such properties as between interstate and intrastate traffic, thereupon disappeared into the limbo of forgotten things.

Since the Wisconsin Rate Case was decided the Interstate Commerce Commission, in the many intrastate rate cases which have been before it, has paid no attention to the value of railroad properties in any given state, considered separately from the value of the property in other states.

SO it has come to pass that the interest of the State Commissions in railroad valuation is of a different character from what it was when the Valuation Act was passed fifteen years ago. Then it was believed that the values of the roads would be soon found, and that such values would in very large measure determine the latitude within which the respective State Commissions might exercise their rate-making powers. The great interest of State Commissions then in valuation sprang from the instinct of self protection.

The State Commissions are still interested in railroad valuation, but for a different reason. They recognize that the public has a very vital interest that the railroad properties shall not be over-valued. They know that the Interstate Commerce Commission in

all general rate cases will have in mind the values which it has found, and the fair return requirements of the Federal Constitution and of § 15a of the Interstate Commerce Act. Because of this interest the State Commissions have for several years past kept in the Washington office a special valuation counsel, who has performed valuable service, not only in the representation of the Valuation Committee on matters of interest to the State Commissions generally, but in the preparation and presentation of evidence, and upon briefs and arguments for such State Commissions as have taken a direct part in valuation proceedings.

THE restraints of Federal power upon state rate making, however, are not now exercised through the courts in proceedings where the value of railroad property is in issue, as the determining factor. They are exercised through the Interstate Commerce Commission in proceedings brought to remove discrimination against interstate commerce, under the new language which was brought in to the law by the Transportation Act.

The discrimination charged may be either of two kinds. It may be alleged that the intrastate rates are so low as to give shippers doing business between points within the state and enjoying the intrastate rates an undue advantage over competitors located outside the state and obliged to pay higher interstate rates.

On the other hand, it may be alleged that the intrastate rates are so low as not to afford proper compensation to the carrier for the service performed by it, thus casting an undue burden on interstate shippers to make up the deficiency of revenue caused by the unduly low state rate, or operating to disable the interstate carrier from the proper performance of its function in the transportation of interstate traffic.

No matter which kind of discrimination is alleged—and generally both are alleged, when carriers complain to the Interstate Commerce Commission of intrastate rates—the issues are wholly different from those raised by confiscation cases in court.

IS there a difference in the rate levels, and if a difference does appear, does it constitute an "undue discrimination?"

These are the issues presented by a discrimination case.

The mere fact of difference in levels does not establish undue discrimination. After the Transportation Act was first passed there was danger that the contrary rule might become established. In the South Carolina Passenger Fare Case, (60 I. C. C. 290) the question was involved whether a state statute which required application of the regular mileage fare with a minimum of 5 cents caused undue discrimination because it prevented the application of the 12 cents interstate minimum. It is difficult to conceive of a more trivial variation so far as its revenue effects were concerned. The Interstate Commerce Commission held that the statute which required that difference in minimum constituted an "undue discrimination," saying that it was clear that whether such discrimination existed did "not depend upon

the amount of revenue involved." That decision was in effect overruled in the Ohio Sand and Gravel Case, 85 I. C. C. 66, in which the Commission held as follows:

> "The law does not require that intrastate rates shall be maintained on the exact level of interstate rates, but only that there shall not exist between the two a disparity so substantial as to operate as a real discrimination against and obstruction of interstate commerce."

THE co-operative provisions which were carried into the Interstate Commerce Act by the Transportation Act amendments have proved of much value. For the first two years after the passage of that act, it is true that the Interstate Commerce Commission was indisposed to make use of those provisions. That period was accordingly inevitably a period of rather vigorous strife, both in litigation and before Congress.

At the end of that period the Interstate Commerce Commission had made Federal orders prescribing intrastate rates in more than a score of states. In many great states practically every rate, passenger and freight, was frozen by a Federal order, so that it could not be changed by the State Commission, or voluntarily by the carrier, and so that even the Interstate Commerce Commission itself, under its procedure, could not permit it to be changed, except after formal hearing and long delay. This was the situation in such states as Illinois, Indiana, North Dakota, Nebraska, Kansas, Texas, Arizona, and Nevada.

This situation did not arise because the State Commissions were indisposed to permit proper advances. It arose in some states because the carriers refused to comply with the laws of those states, so that they might receive advances under the state laws. In other states it arose because the respective State Commissions found somewhat less or different advances reasonable, due to the peculiar situations in their states, and the Interstate Commerce Commission insisted upon exact uniformity.

ALL of these matters had been presented to Congress. The situation was not tolerable. Some remedy had to be found. This was finally recognized by the Interstate Commerce Commission, which invited a conference, and out of the conference came the co-operative agreement of 1922, under which the skies have largely cleared, though clouds come up now and then. Whether that agreement will suffice to enable the survival of our dual regulatory system, without the enactment of legislation which shall cure some of the rather glaring defects that now exist in our Federal law is uncertain. Under it, however, by working considerably together, the State and Federal Commissioners have been able to cover the regulatory field without serious clashes of authority, and without litigation; and under it the State Commissioners have had an important part in the hearing and consideration of cases involving attacks on intrastate rates.

It has been already pointed out that in consequence of the decision of the Interstate Commerce Commission in the Shreveport case, and of legislation which has been enacted by Congress, and construed by the court as

extending the application of the principle established in that case, it has come about that attacks on state rates are no longer made in the Federal courts. Confiscation suits, involving state-made railroad rates are as obsolete as the dodo. Attacks on such rates are made now in Washington before the Interstate Commerce Commission upon the ground of discrimination.

THERE are various ways of handling these complaints. The Congress contemplated that discrimination, if existing, might be removed by co-operation, and "to that end," to use the language of the statute, it authorized joint conferences and joint hearings. This was the idea of those who advocated and brought about the co-operative provisions of the law.

The co-operative agreement between the Interstate Commerce Commission and the State Commissions accordingly, provides as follows:

> "Whenever a petition is filed with the Interstate Commerce Commission alleging that intrastate rates unjustly discriminate against interstate commerce, or persons or localities engaged therein, and asking the Federal Commission to remove such discrimination, the State Commission of the state or states affected thereby shall immediately be notified of such petition by the Federal Commission. If either a State Commission having jurisdiction over rates thus attacked, or the Federal Commission desires a conference thereon it should notify the other without delay, and thereupon such conference should be arranged, likewise without delay."

The idea that lies behind this provision is that when it is complained that rates prescribed by a state create unlawful discrimination the natural and proper thing to do is for the Federal and State Commissions charged, respectively, with Federal and State regulation of the traffic affected, to discuss together the rate situation complained of, and the occasion, if any exists, for a formal proceeding by the Interstate Commerce Commission.

While the carriers have the right to complain to the Commission that intrastate rates are discriminatory, the effect of such complaint is nothing more than a request that the Interstate Commerce Commission shall institute an investigation. Whether such investigation shall be instituted must rest within the discretion of the Commission.

IN practice, the Commission has seldom failed to institute an investigation when requested. Whenever there is doubt as to whether discrimination does or not exist, which doubt can only be determined by an ascertainment of facts in a hearing, the investigation will ordinarily be instituted as a matter of course; but whenever it appears from the complaint itself, taken in connection with facts already known to the Commission, that there is no reasonable ground for assertion of jurisdiction, then the Interstate Commerce Commission ought not to waste its own time, nor impose expense of time and money upon the State Commissions, by instituting an investigation. In a case to which I have already referred the Interstate Commerce Commission has also held, as was its plain duty under the language of Chief Jus-

tice Taft in the Wisconsin passenger fare case, that to justify a finding of discrimination there must exist between the intrastate rates and the interstate rates a "disparity so substantial as to operate as a real discrimination against and obstruction of interstate commerce."

If, then, in a given case, the complaint is based upon an alleged inadequacy of rates, and it appears from the face of the complaint, or is otherwise known to the Commission without hearing, that the amount of revenue involved is trivial merely, the Commission may properly refrain, and should refrain, from instituting any investigation.

ASSUMING, however, that the Commission will order an investigation asked for by a carrier,—as usually it will—the question arises whether it shall be dealt with under the co-operative plan. If it is so dealt with, the State Commissioners will sit at the hearing; they will have opportunity for conference with the examiner before any tentative report is promulgated; and they will sit with the Interstate Commerce Commissioners upon the argument and in conference upon consideration of the case. The statute gives no vote to State Commissioners in co-operative cases, but it was evidently the judgment of the Congress that their participation in the discussion and deliberations of the Federal Commission, when charges of discrimination against state rates are being dealt with, will aid towards the reaching of right conclusions by that body.

That it does so aid, experience has demonstrated.

Sometimes, however, it may happen that a State Commission for some reason deemed good by it, will prefer to engage actively as a litigant in the trial of a case before the Interstate Commerce Commission wherein its intrastate rates have been attacked. This it has a right to do.

In any event, whether the case be handled under the co-operative plan, or be litigated before the Interstate Commerce Commission, with the State Commission as a party litigant, the proceeding begins and ends in Washington. The Washington office of the association, accordingly, affords a convenient point of contact as to all questions which may arise between the State Commissions and the Interstate Commerce Commission.

THE part which the Washington office of the State Commissions has had in securing, first: the enactment into law of the co-operative provisions of the Interstate Commerce Act; next, in the bringing about of the co-operative agreement in 1922, and finally, in promoting the successful application of that agreement in actual practice since it was made, while not the most conspicuous work of the office since its creation, will perhaps in subsequent years be regarded as its greatest single contribution towards successful regulation of the railroads of the country, under our dual form of government.

Probably the most conspicuous activity of the association has been its participation in interstate rate cases of general interest—sometimes for the National Association as a whole, as representative of all the Commissions of the country, and sometimes

for groups of Commissions, and sometimes for single Commissions.

In late years the State Commissions have come to recognize that the interest of the people of their respective states in interstate rates is vastly more important than their interests in rates applicable to traffic which moves wholly within state boundaries. Hence these Commissions are continuously interested in rate proceedings before the Interstate Commerce Commission; and their Washington office is increasingly used in these cases.

To a very limited extent, the office also acts as a legislative agency for the State Commissions, in that it supplies a means of representation before Congressional committees upon any matter of legislation in which the State Commissions generally, or any single State Commission, may have an interest. Such legislation is ordinarily that which might circumscribe or otherwise affect the jurisdiction and power of state regulatory authorities.

The office also maintains a bulletin service for the prompt information of State Commissions as to decisions of the United States Supreme Court and of the Interstate Commerce Commission, and as to matters of legislation or other governmental actions, affecting such Commissions.

It will be seen, therefore, that the Washington office of the State Commissions came into existence to meet necessities produced by the concentration of governmental powers in Washington; and that its activities are now directed towards preserving the present powers of the state regulatory agencies from further encroachment; and towards the coordination of the action of state and Federal Commissions in the exercise of their present powers, so that the regulatory field may be covered by the exercise of those powers with the greatest possible efficiency and the least possible friction.

The office is a unique agency, in that it is in practical effect an arm of the governmental machinery of 47 different states (Delaware having no Commission, and New York two). It is strictly a state agency, in that it is wholly supported by the states, which directly meet the salary and expenditures of the General Solicitor, without contribution of any sort from the Federal government, although the members of the Public Utilities Commission of the District of Columbia and of the Interstate Commerce Commission are included in the membership of the National Association of Railroad and Utilities Commissioners, in the name of which the office is maintained.

What Effect Has Commission Regulation on the Values of Public Utility Securities?

To answer this ever-live inquiry, PUBLIC UTILITIES FORTNIGHTLY *sent a questionnaire to Mr. Henry R. Hayes, former president of the American Investment Bankers Association, and one of the best-known authorities on finance in the country. His reply was so informative that it will be published in its entirety in the next issue—out March 7th.*

The March of Events

Would Bar Public Utilities from Broadcasting

A PROPOSAL was made by Senator Black of Alabama, before the Senate Committee on Interstate Commerce, on February 5th, that public utility corporations as owners or operators of broadcasting stations be barred from broadcasting. Senator Black is reported to have prepared a proposed amendment to the Federal Radio Commission bill for that purpose.

The amendment provides: "No permit for the operation of a radio station shall be granted to any public utility corporation or to an individual operating a public utility corporation, or to any corporation in which the stock is owned in whole or in part by a public utility corporation or the officers thereof, or to a corporation which is affiliated with a public utility corporation. If any permits have been previously issued to such corporation or individuals, they shall not be hereafter extended, but they shall be revoked."

Vice Chairman E. O. Sykes, of the Commission, explained that the Commission has been deadlocked on the application of the Richmond Development Company, which proposes to construct a station at Roanoke, Virginia. This company, he declared, is admittedly a public utility, and in its original application to the Commission stated it desired to establish the station to promote a better understanding between public utilities and the people by means of broadcasting.

California

Electric Rate War in Southern California

A RATE war between the electric utilities in Southern California is being discussed in the California newspapers. The Southern Sierras Company, the Southern California Edison Company, and the Los Angeles Bureau of Power & Light are involved in the fight.

The Southern Sierras Power Company has had pending before the Commission an application for an increase in rates for some time, but following a reduction in rates by the Southern California Edison Company the Sierras Company filed a new schedule of reductions. Then the municipal bureau cut its rates to meet the competition and, says the San Francisco *News*, the Edison Company met this reduction, and the Sierras Company announced another cut that would reduce rates about $90,000 a year in the Imperial Valley alone.

Investigation of Telephone Rate Increase

THE hearings before the Commission on the application for increased rates for the Pacific Telephone & Telegraph Company were adjourned on January 16th to February 19th. This followed the examination of experts of the Commission who testified in regard to cost statistics, depreciation estimates, and property appraisals gen-

erally. A controversy had also arisen on the question of the use of manual telephone equipment after automatic telephones had become available.

The cities opposing the rate increase have added to their forces Milo R. Maltbie, of New York, who has been employed to assist Dion R. Holm, assistant city attorney, in charge of the telephone case for San Francisco. Mr. Maltbie expressed the opinion that the Western Electric Company, which is affiliated with the Pacific Telephone & Telegraph Company and the American Telephone & Telegraph Company, and which manufactures telephone equipment, should be investigated to determine whether charges for equipment are exorbitant, according to a statement in the San Francisco *Chronicle*.

Idaho

Publicity of Information in Reports to Commission

THE Senate on January 25th passed a bill giving the Commission authority to divulge information contained in the annual reports of the public utility companies. Considerable debate preceded its passage, says the Salt Lake *Tribune*. Senator Whitten, of Boise county, had declared that he had been refused the information even though he desired it in connection with taxation bills. Senators Rockwell of Blaine and Robertson of Washington county contended that the railroads had certain private contracts in which the public had no interest, to which Senator Whitten replied that all information should be given out because the company was a public utility and as such was guaranteed a fair return on its investment.

Illinois

Women Besiege Commission for Seven-cent Fare

ONE hundred women, most of them housewives, accompanied by their husbands, says the Chicago *American*, appeared at a hearing before the Commission on January 29th to assist in the fight of residents of the Archer Limits section for a 7-cent street car fare with free transfers. Many of the women in the rear of the room stood upon chairs and benches to watch the witnesses testifying for the Chicago & Joliet Electric Railway Company.

Objection is made to paying a 12-cent combination fare on the Chicago & Joliet and the Chicago Surface Lines, on the ground that Archer Limits is now a part of Chicago. Representatives of the Chicago & Joliet contend that their company is operating under a 50-year state franchise, that it has invested $300,000 in equipment, and that a ruling of the Commission against the company would mean property confiscation in violation of constitutional provisions.

Indiana

Commission Power to Award Reparation Denied

THE power of the Commission to grant reparations for excessive freight rates if those rates have been previously established by the Commission has been denied by Judge Byron K. Elliott of the superior court. On January 22nd Judge Elliott sustained a demurrer filed by two railroad companies to a petition by shippers asking the enforcement of judgments of the Commission awarding refunds.

The Commission in 1927 established a certain rate between Michigan City and Anderson. Thereafter certain shippers asked for a refund for past payments, and the Commission on June 22, 1928 upheld the claims of the shippers. Shippers contended that the legislative intent was clearly expressed giving the Commission power to fix reparations, but Judge Elliott held that the Commission, as a creature of the legislature unknown to common law, had no authority except that expressly granted by the statutes, and that although it had authority to decide upon rates to be paid in the future, it was unauthorized to make retroactive rulings such as reparation orders.

Kansas

City Votes to Continue Battle for Lower Gas Rates

A MOTION to continue the fight for a lower gas rate, announces the Wichita *Eagle,* was passed by the city commission on January 28th, although such procedure would add $10,000 to the money already spent in court battles.

A rate had been granted by the Commission which was approximately $1.25 for the first 1,000 feet, $1 for the next 2,000 feet, and 50 cents for each 1,000 feet thereafter. The gas company objected and put into effect a compromise rate of approximately $1.50 for the first 1,000 feet, $1 for the next 2,500 feet and 50 cents for each 1,000 feet thereafter. After unsuccessful attempts at compromise, the Wichita Gas Company secured an injunction against the Commission rate.

Louisiana

Legality of War Rates Sustained

ELECTRIC light and power rates placed in effect during the war and continued since that time by the New Orleans Public Service, Inc., and its predecessor, it is reported in the New York *Journal of Commerce,* were declared legal in a decision given in civil district court in New Orleans in a suit brought to collect a 30-per cent refund from the company on the ground that the increase in rates authorized during the war period should have been cancelled in 1922.

Maine

Hearing on Proposed Merger of Water Utilities

THE Commission on January 29th held a hearing on the petition of fifteen water utilities for consolidation with the Maine State Water & Electric Companies, and the petition of the latter company for authority to issue securities to pay for the properties, franchises, and permits of the utilities, it is reported in the Augusta *Journal*.

The Maine State Water & Electric Companies is a corporation organized under the laws of Maine with power to own, construct, and operate water companies and to own stocks and bonds of the companies. When it becomes an operator of physical plants, it becomes a public utility, but it has not yet become one. The company, it is announced, has acquired and now has control of all of the individual companies. Some opposition has arisen on the part of several communities which object that the capitalization is excessive, and further, that unrelated companies should not be consolidated in a large merger of this sort.

Maryland

Rate Investigation Follows Stock Rise

THE Commission on January 25th ordered an investigation to determine the prescribed rates and charges to be collected by the Consolidated Gas, Electric Light & Power Company following a 22-point rise of the company's stock on the Baltimore stock exchange and the New York curb market. Moreover, it appears that the present schedule will expire June 30th and that its reports show exceptionally good earnings.

Heads of civic groups and community organizations throughout the city, says the Baltimore *Post*, have indicated that they will send representatives to the hearings before the Commission. It is believed that the inquiry may clear the way for further reductions in gas and electric rates.

The Commission is expected, as part of the rate inquiry, to investigate the origin and purpose of the recent buying of stock. While the company is considered one of the best managed properties of its kind in the country, the price level the common stock has reached is regarded by many as far above the point it would reach as the result of investment buying without the action of other forces.

Massachusetts

Cheaper Gas Wanted in Hyde Park

A PETITION signed by residents of the Hyde Park district for customers of the Dedham-Hyde Park Gas & Electric Company was filed by Senator John F. Buckley with the Department of Public Utilities on January 28th for the purpose of securing a repeal of the service charge of 50 cents and a reduction in the price of gas to an amount not exceeding the rate of the Boston Consolidated Gas Company.

The rate in Hyde Park is $1.50, plus the 50-cent service charge, as against $1.20 with no service charge made by the Boston Consolidated Gas Company. Discrimination is alleged and objection is made to paying higher rates in Hyde Park than in other parts of the Boston metropolitan area.

Minnesota

Power Company Appraisal to Be Checked

An independent investigation, on behalf of the city of St. Paul, of the valuation and rates of the Northern States Power Company is being planned. Provision for such an investigation and for the employment of a utility expert is contained in a resolution adopted by the city council on January 23rd.

The company on December 8, 1928 had delivered to Commissioner Otto W. Rohland, Jr., an appraisal of its property, and Commissioner Rohland considered the valuation too high. Some of the items under attack are building service expense, contractor's profits, omissions and contingencies, overheads and depreciation. Possible overdevelopment or duplication of plant is also being studied by representatives of the city.

Plans for Scientific Gas Rate Schedule Dropped

Negotiations for a new rate schedule in Minneapolis based on a scientific plan for apportioning costs to the various classes on a basis which would encourage a larger use of service has been abandoned, according to a statement in the Minneapolis *Tribune*. The city council was notified by the Minneapolis Gas Light Company that the company was withdrawing from negotiations on the ground that no agreement could be reached under the present circumstances, and the council gas committee decided to drop further negotiations.

One of the aldermen told the committee that a former Minneapolis business man, now in the east, would have returned to the city to establish a factory if the step-rate proposal had gone through. Definite dropping of negotiations, it is reported, means that the step-rate plan which would cut the costs of large consumers would be abandoned until the expiration of the present franchise in 1930.

Banking and industrial leaders of Minneapolis, says the Minneapolis *Journal*, had swung their support to a proposed step rate structure for gas. Cheaper fuel for industry is considered one of Minneapolis' most urgent needs at the present time. The stimulation of the use of gas for home heating has also been stressed as a reason for working out a new form of schedule to meet the needs of the community.

Permanency of Uniform Fares in Twin Cities Uncertain

When the Minnesota Commission on January 25th ordered the establishment of a 10-cent cash fare, with six tokens for 45 cents, in Minneapolis after investigation, and a similar fare schedule in St. Paul by stipulation pending a separate review of the situation in that city, final disposition of the St. Paul case was left open. As Commissioner C. J. Laurisch explained, the fares in St. Paul must be fixed by the Commission upon the basis of the cost of service on the St. Paul City Railway, which is probably in excess of the cost of service on the Minneapolis Street Railway.

The desire of St. Paul car riders for

a fare equal to the fare in Minneapolis has developed to the extent that a resolution is proposed to amend the Brooks-Coleman Act so as to provide that street railway systems operated in contiguous cities of the first class shall be operated as one unit and the rates of fare in each city shall be the same. The stipulation for equal fares is temporary only, and unless legislation is enacted it is believed by some that St. Paul may eventually be required to pay higher fares than the fares in Minneapolis.

The hoarding of street car tokens just prior to the fare increase resulted in such a shortage that conductors were rationing the sales of tokens on a basis of three for 20 cents instead of the customary six for 40 cents, it is reported in the Minneapolis *Evening Tribune*. This developed a legal controversy over the interpretation of the law, with many of the riders insisting that inasmuch as they were willing to pay the required fare, with no tokens forthcoming, they planned to ride for a 6-cent cash fare until the tangle had been straightened out. Commissioner Laurisch is reported to have stated that he did not see how the company could be restrained from selling three tokens instead of six as long as the rate of fare as existing was being adhered to by the street railway company.

Duluth Street Car Fares to Be Studied

A HEARING on the application of the Duluth Street Railway Company for increased fares has been announced for March 12th. The company on January 26th filed a petition asking for a reasonable rate of return without specifying a definite fare.

The company urged that it is getting a return of only 3.45 per cent on its investment under a fare schedule of 8 cents cash or five tokens for 35 cents. It is reported that the Duluth Company has many of the same stockholders as the Twin City Rapid Transit Company which is the owner of the Minneapolis and St. Paul lines being operated in Minneapolis and St. Paul.

Mississippi

New Telephone Toll Line Planned

THE Southern Bell Telephone Company, it is reported in the Holly Springs *Southern Reporter*, has provided toll facilities or long distance lines in this year's budget from Holly Springs to Grand Junction, Tennessee. This will make long distance connections possible for Hudsonville, Lamar, Michigan City, and Grand Junction, thereby opening up a new territory for the points named. Since this territory is in the Holly Springs trade radius it means much to the merchants and business people generally in Holly Springs and its vicinity.

Misssouri

Rehearing Asked in Laclede Gas Rate Case

THE Commission on January 25th was asked to reopen the Laclede Gas Light Company rate case on the ground that the order increasing rates was contrary to the evidence and that the Commission erred in making its ruling. Objection is made that the effect of the new schedule will be to decrease rates to large consumers of gas and to in-

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crease rates to the small consumers, which represent 91 per cent of the revenue of the company annually.

Another motion before the Commission asks that the utility be required, if the city's motion for rehearing be denied and the schedule be allowed, to keep accurate detailed accounts of each individual consumer and make quarterly reports to the Commission, so that in the event of a test of the matter in court, refunds can be readily and accurately determined.

The gas company also filed a motion for a rehearing, in which it alleged errors in valuation in the allowance for depreciation, in the denial of the right of the company to recoup losses, in denying an adequate return, and on other grounds.

Kansas City Fare Case to go to Commission

THE Kansas City Public Service Company has announced that its fight for a 10-cent fare will be carried direct to the State Public Service Commission, according to a statement in the Kansas City *Journal*. The issues which have been in controversy for some time have become too involved in public discussions, it is asserted, and since under the law the Commission is the final arbiter in the affairs of the company and the only body with power to make final and authoritative ruling on points at issue, steps are being taken to bring the entire matter before the Commission for settlement after investigation by that body.

New Jersey

Mayors Plan Gas Rate Fight

THE mayors of municipalities in Essex county were summoned to a meeting in Newark on February 4th to discuss the proposed revision of gas rates. Mayor Kenworthy of Belleville, chairman of the mayors' committee of Essex county, according to the Newark *Call*, has stated that the mayors are not in favor of the method proposed by the Public Service Corporation for solving the rate question. Opposition is made particularly against the increase in rates to small users.

While at the earlier hearing each municipality was represented separately, there seems to be a general impression that the matter could be handled better by one representative selected by all the municipalities in the county acting together as a unit.

New York

Bill Offered to Relieve Railways from Paving Expense

THE legislature has before it a bill to relieve the traction companies of the state of a part of the cost of paving between tracks. Sponsors of the bill assert that this relief is necessary to keep some of the railway companies, especially those operating in small cities, from being forced into bankruptcy.

At present more than eight feet of the street on which street railways operate must be kept in repair by the company but under the proposed law this would be reduced to about 3 feet.

Similar bills have appeared before the legislature for several years but there has been such strong opposition by the cities that they failed of passage. The

opposition to this legislation has been decreasing from year to year as the cities have come to realize that paving costs should be borne by others than car riders under modern traffic conditions, and that street railways are in dire need of relief from the heavy burdens of paving.

Sale Price of Trolley System Starts Rate Agitation

THE sale of the United Traction Company recently for approximately $7,500,000 has incited the cities of Albany, Troy, Watervliet, Cohoes, and Rensselaer to make a new attack upon the 10-cent fare granted about two years ago, when the property was valued for rate-making purposes at $12,000,000. Formal applications may be made before the Commission for reopening of the case, or if it is too late to make that move, a new case against the street railway company may be started for the purpose of obtaining a lower valuation.

Sub-Meter Fight Delayed

HEARINGS before the Commission in its investigation of electric submetering in New York city were adjourned on January 23rd to February 20th at the request of Clarence J. Shearn, former Supreme Court Justice, who has been retained by the Real Estate Board and the Building Managers and Owners Association.

The sub-metering companies, represented by S. Stanwood Menken, have thus secured strong allies from the real estate field in their contest with the electric utilities over the resale of electric current to tenants of apartment buildings.

Mr. Shearn is reported to have stated that landowners desired to place all submetering under the jurisdiction of the Commission and that they hoped to make the industry a fair work managed in the public interest.

Ohio

Gas Shut-off Enjoined

THE East Ohio Gas Company on February 2nd was enjoined temporarily by Appellate Judge John J. Sullivan from shutting off its gas to consumers in Cleveland and from charging any rate in excess of its present rate while the gas case is being fought in the Cuyahoga court of appeals. Judge J. D. Barnes of Sidney, Ohio, had previously refused an injunction, holding that the company was entitled to shut off service and withdraw its property. The company made no strenous objection to the entry of the temporary injunction order in the higher court.

Oklahoma

Utility Connections with Private Lines

A BILL has been introduced in the Oklahoma legislature to provide for the construction of facilities up to the lines of public service corporations and common carriers and for connection with such corporations. The bill would compel the rendering of service by public service corporations to persons who construct facilities in accord-

ance with the rules and regulations of the Commission, but without connection costs to the utility.

The bill is interpreted by some to mean that when one or more persons construct transportation lines to existing service lines of public utility companies, and comply with the rules of the Commission, such public utility companies will be required by the new statute to furnish service to these individuals.

Pennsylvania

Ordinance Proposed for City Operation of Subway

AN ordinance was introduced in the Philadelphia city council on January 24th providing for the operation of the Broad Street subway by the city on a 5-cent fare basis. The Philadelphia Rapid Transit Company is operating the subway under a councilmanic authorization which will be terminated on March 1st unless some action is taken in the meantime.

The new ordinance would also make provision for the establishment of a bureau of operation in the department of city transit and would authorize the director of transit to employ the necessary help for the operation of the subway and the maintenance of the structures and equipment in proper service condition.

Hearings in Water Case Postponed

THE Commission has designated February 26th for the next hearing on the numerous complaints against the proposed rate increases of the Scranton-Spring Brook Water Company, at Harrisburg. A tentative date had previously been fixed as February 13th but the crowded condition of the calendar made the further postponement necessary.

According to indications, says the Wilkes-Barre *Times-Leader,* at the next hearing officers of the Federal Water Service Corporation of New York city, which is the holding concern of the Scranton-Spring Brook Water Company, will be cross-examined, and the water company engineer, who was unable to appear at the last hearings because of illness, will also be summoned to the stand. The attorney for the water company will probably quiz J. F. W. Heinbokel, chief accountant for the communities, who has submitted to the Commission a compilation of receipts of all the subsidiary companies showing the profits made by each under individual management before their absorption and consolidation.

Bill to Regulate New Rate Schedules

A BILL has been offered in the legislature to prevent new rate schedules of public utility companies from becoming effective until final action by the Commission. In Pennsylvania it has been the rule that rate schedules shall become effective thirty days after they are filed unless, of course, some positive action is taken to prevent their establishment.

Legislation of the same sort was proposed in 1925 following an increase in fares of the Philadelphia Rapid Transit Company before the Commission had taken all the testimony. This is said to have precipitated a controversy between Governor Pinchot and some of the members of the Commission in office at that time.

New Gas Rates for House Heating

GAS rate schedules providing for house heating at the rate of 75 cents for each 1000 cubic feet per month are reported to have been filed with the Commission by the companies in the Harrisburg district and in Reading, Allentown, and vicinities. The customer in order to get this rate must guarantee a minimum revenue over the eight months' heating season of $150, equivalent to the use of 200,000 cubic feet, with monthly payments of $18.75.

The new rates will affect eighteen owners of gas heating systems out of the 31,000 consumers in the Harrisburg district, according to a statement by George L. Cullen, commercial agent of the local company.

Tennessee

Rate Reductions for Electric Consumers

A NEW rate schedule will be put into effect by Power-Light on March 1st, it is reported. Revised schedules filed with the Commission will yield $50,000 a year less in revenues, according to estimates by the utility company.

Two months ago the city council called for a light and power rate investigation, but, according to the Knoxville *Sentinel*, no action has been taken in that matter.

Under the new schedules some electric bills will be increased, although it is claimed that for a whole year the rates will be lower as a rule. The company, however, has agreed to give each customer six months from the date of the first billing under the new rates to decide whether to accept the new or continue under the old rate.

The revisions are made with the idea of encouraging greater consumption of current by making reductions as the amount of current consumed increases. Thus, electric appliances can be used at lower cost than has been possible in the past.

Texas

Utilities' Control Plan

THE Westbrook bill, which would place all public utilities under regulation by the Railroad Commission, has been bitterly contested by the cities which wish to retain their powers to regulate local utilities. The bill would give the Commission broad powers over the utilities, permitting it to fix rates, examine audits, and in general administer them as it now does the railroads and motor bus transportation companies.

Senator Edward Westbrook, the sponsor of the bill, is reported in the Houston *Chronicle* to have stated that it is in substance recommended by the American Bar Association for adoption by all states. Texas is one of the few states now in which all these utilities are not regulated by the Commission.

Virginia

Ordinance Fixing Lower Gas Rates Held Up

THE proposed city ordinance fixing lower rates for large users of gas was tabled by the finance committee of the Richmond city council after lengthy discussions on January 29th, it is reported in the Richmond *Times-Dispatch*. Some of the alderman believed that all users, the small as well as the large, should be benefited by any rate reductions which the city may deem advisable.

West Virginia

Commission Hears Application for Higher Water Rates

THE Commission on January 30th heard evidence on the application of the city of Wheeling for authority to increase water rates. The hearing was adjourned after attorneys representing the city and the protestants had agreed to supply the Commission with copies of records submitted at former hearings but later destroyed in the fire that burned the temporary capitol.

It was testified that the city water plant was being operated at a loss of $150,000 a year and that the water department had on its books $100,000 in uncollected accounts. Civic organizations opposing the increase in rates objected to a proposal that a fund of $203,000 be raised to provide for extensions and replacements of mains, on the ground that some of the revenue raised from water rents was not being used for the water department but was being diverted to other purposes.

Higher Interurban Fares Opposed

INCREASES in fares on the Wheeling Traction Company line for interstate service went into effect on January 20th with the approval of the Interstate Commerce Commission. Only one protest was made against the increase, and this was by the city council of Bellaire at too late a date to receive consideration.

Opposition has been organizing, however, to oppose increases in fares for transportation entirely within the state, in anticipation of the filing of petitions with the Ohio and West Virginia Commissions for authority to make such increases. McMechen city council had a meeting on January 21st which went on record as opposing any increase in street car fares which the Wheeling Traction Company may try to obtain.

Wisconsin

Street Railway Requests Increase in Fares

A PETITION for a uniform transit fare within the city limits of Milwaukee and a schedule of fares enabling the electric company to put its transportation system upon a self-sustaining basis was filed January 16th with the Commission. A report of income filed by the company shows that earnings from the power department for years have had to be used to make up for low returns on the transit lines.

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

VOLUME 1929A NUMBER 4

Points of Special Interest

THE decisions, orders and recommendations of Courts and Commissions, as printed on the pages following, conform to the standard size, proportions and typographical arrangement observed in law reports generally. The pages are numbered, for the purpose of citation, as they will later appear in the bound volumes

PUBLIC UTILITIES REPORTS, ANNOTATED

UNITED STATES SUPREME COURT.

UNITED FUEL GAS COMPANY et al.

v.

RAILROAD COMMISSION OF KENTUCKY et al.

[No. 1.]

(— U. S. —, 73 L. ed. —, — Sup. Ct. Rep. —.)

Courts — Federal jurisdiction — State law.

1. Federal courts which have jurisdiction of a cause of action in which questions are raised under the Constitution of the United States may pass on all questions of state law involved, and must do so so far as they are necessary to a decision, p. 436.

Constitutional law — Validity of statute — Right to raise question.

2. A public utility company which has procured action from a State Commission under a state statute may not assail that action in a Federal Court of Equity on the ground that that statute, or the one creating the Commission, is void under the state Constitution, p. 436.

Service — Powers of state — Abandonment.

3. A public utility company may be compelled by a state, acting through its Commission, to continue to use present facilities to supply an existing need so long as it continues to do business in the state, p. 437.

Service — Abandonment — To compel higher rates.

4. A Commission acting under a statue forbidding the withdrawal of public utility service without the permission of the Commission may prevent the abandonment of service by a public utility company which threatens to discontinue service if it does not receive the rate demanded. p. 438.

Injunction — Illegal rate order — Absence of irreparable injury.

5. A public utility company may not resort to a court of equity to restrain the enforcement of a Commission order fixing rates on the ground that the order is illegal or transcends constitutional powers if the rates are not shown to be confiscatory, since the company cannot complain if it has suffered no injury, p. 439.

Rates — Reasonableness — Burden of proof.

6. The burden of proving the value of property on which a public utility company is constitutionally entitled to earn a fair return rests upon it and, to justify judicial interference with the action of state officers in fixing a rate assailed, must be supported by clear and convincing evidence, p. 442.

Valuation — Natural gas lands — Estimated price of unregulated gas.

7. An estimate of the value of a gas plant should be rejected in a valuation for rate making when arrived at by estimating the amount

of natural gas in the ground which will remain available for appropriation for eighteen years and applying to that quantity an assumed price for gas in an unregulated market, with a further speculative prediction as to the cost of transporting the gas to such a market, p. 443.

Valuation — Natural gas land — Book value — Absence of other evidence.

8. Book value was accepted as an assumed value of a gas field made by the public utility company in the absence of convincing evidence of a higher value, p. 446.

Return — Revenues from gasoline extraction — Natural gas company — Contractual arrangement.

9. A finding by the Commission that a natural gas utility should be credited with 50 per cent of the net proceeds of the sale of gasoline extracted by an affiliated company from natural gas, when based upon substantial evidence, including evidence of a satisfactory return to the extraction company, should not be disturbed, notwithstanding an agreement between the companies that the utility should receive one-eighth of the gross profits from the gasoline, p. 447.

[January 2, 1929.]

APPEAL from a final decree of the District Court for the Eastern District of Kentucky denying an injunction restraining the Kentucky Commission from establishing an alleged confiscatory rate for the sale of natural gas, or in the alternative from preventing the abandonment of service; affirmed. See same case below, 13 F. (2d) 510.

Appearances: John W. Davis, of New York city, for appellants; John T. Diederich, of Ashland, Kentucky, for appellees.

Mr. Justice **Stone** delivered the opinion of the Court:

This is an appeal from a final decree of the district court for Eastern Kentucky denying an injunction restraining the appellee, the Railroad Commission of Kentucky, from establishing an alleged confiscatory rate for the sale of natural gas in the cities of Ashland, Catlettsburg, and Louisa, Kentucky, or in the alternative from preventing appellants from withdrawing their service in the sale and distribution of natural gas to consumers in those cities. 13 F. (2d) 510. The case comes here on direct appeal under § 238 of the Judicial Code, U. S. C. title 28, §§ 341, 345, the decree of the district court having been entered before the effective date of the Jurisdictional Act of February 13, 1925.

The case was argued here with No. 4, United Fuel Gas Co. v.

Public Service Commission, — U. S. —, post, 112, 73 L. ed. —, 49 Sup. Ct. Rep. —, decided this date, which involves some questions considered in the opinion in this case.

Appellant, United Fuel Gas Company, a West Virginia corporation, also appellant in No. 4, is engaged in the business of producing natural gas from gas fields located principally in West Virginia, which it sells to consumers in West Virginia, Kentucky, and Ohio. A part of its business is the sale of gas wholesale to distributors in West Virginia, and has not been subjected to regulation by any public body. Its local business in Kentucky is subjected to regulation by appellee. It formerly held franchises for the sale and distribution of gas in the Kentucky cities named, all of which had expired by July, 1918. Nevertheless, it continued its service in those cities until June, 1923, when it organized appellant Warfield Natural Gas Company, a Kentucky corporation, whose stock it owns and to which it conveyed its property in Kentucky and which has since carried on its business of distributing gas in the cities named. The United Company then purported to withdraw from all its business in Kentucky by cancelling appointments of agents to receive service of process within the state and by notifying the secretary of state of its action.

Before the organization of the Warfield Company proceedings were had before the Commission which resulted in its order directing a reduction of rates by the United Company to 80 per cent of the former rate of 40 cents per 1,000 cubic feet, less 5 cents for prompt payment. Promptly on its organization the Warfield Company filed with the Commission a new rate schedule for the cities named of 45 cents per 1,000 cubic feet, with a reduction of 5 cents for punctual payment, and petitioned the Commission to establish this rate as fair and reasonable or, in the alternative, to permit it to withdraw its service from those cities. After an extensive hearing the Commission denied the application and construed its earlier order as requiring a rate of 28 cents (80 per cent of 35 cents).

The present suit was then brought in the district court. That court construed the order of the Commission as fixing a 32-cent rate which it upheld and enjoined the Commission from impos-

ing any lower rate. From the latter part of the decree no appeal was taken.

The present appeal challenges the constitutionality of the order of the Commission, as construed by the court, under the 14th Amendment of the Federal Constitution, both because the rate is confiscatory and because the order, which under the Kentucky statutes is not subject to judicial review, was not supported by findings of the Commission. The validity of the order is also assailed on the further grounds that the part of it which required appellants to continue to render service violates the Kentucky Constitution and that the Commission itself was never constitutionally created, and hence was without jurisdiction, because the legislative act establishing the Commission and giving it its authority is in violation of § 51 of the Kentucky Constitution, which provides that no legislative act shall relate to more than one subject, which shall be expressed in its title.

[1] The district court and this court, having jurisdiction of the cause since questions are raised under the Constitution of the United States, may pass on all questions of state law involved (Risty v. Chicago, R. I. & P. R. Co. 270 U. S. 378, 387, 70 L. ed. 641, 650, 46 Sup. Ct. Rep. 236), and must do so so far as they are necessary to a decision.

[2] Section 163 of the Kentucky Constitution provides that gas companies may not procure franchises permitting them to lay pipes in and under public streets without the consent of the appropriate municipal governing bodies, and § 164 limits all franchises to periods not exceeding twenty years. Section 23 of the Statutes of Kentucky, Chap. 61, Acts of 1920, p. 250, subjects any public service company which has continued its service after the expiration of its franchise to the jurisdiction and authority of the Railroad Commission, and forbids it to withdraw such service without permission of the Commission so long as it remains in business in any part of the state. It is said that the action of the Commission under this statute in effect operates as a renewal of the franchise of appellants in the cities named in a manner not in conformity with the provisions of the state Constitution.

But this objection, and that as well to the constitutionality, on

state grounds, of the statute creating the Commission and defining its powers, are not available to appellants in the present suit. It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. Wall v. Parrot Silver & Copper Co. 244 U. S. 407, 61 L. ed. 1229, 37 Sup. Ct. Rep. 609; Electric Co. v. Dow, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Hurley v. Commission of Fisheries, 257 U. S. 223, 66 L. ed. 206, 42 Sup. Ct. Rep. 83; St. Louis Malleable Castings Co. v. Prendergast, 260 U. S. 469, 67 L. ed. 351, 43 Sup. Ct. Rep. 178. Upon like principle, we think that appellants, who have procured action by a State Commission under a state statute, may not assail that action in a Federal Court of Equity on the ground that that statute, or the one creating the Commission, is void under the state Constitution. Cf. Shepard v. Barron, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737. The sound discretion which controls the exercise of the extraordinary powers of a Federal Court of Equity should not permit them to be exerted to relieve suitors on such a ground from the very action of state authorities which they have invoked.

[3] Assuming, as we do for present purposes, the authority of the Commission under state law to refuse its permission to appellants to withdraw, we perceive no objection under the Federal Constitution or otherwise, to withholding it. Appellants do not seriously deny that the Warfield Company is but an agency organized by the United Company for the purpose of carrying on its public service business in Kentucky, or that through that agency the latter is doing business in the cities named and elsewhere in the state. In these circumstances its continuance in those cities is neither forbidden nor illegal. It remains subject to state regulation and control of it is, by state statute, vested in the Commission with state-wide authority. If a state may require a public service company subject to its control to make reasonable extensions of its service in order to satisfy a new or in-

creased demand, present or anticipated (New York ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122; New York ex rel. Woodhaven Gaslight Co. v. Public Service Commission, 269 U. S. 244, 70 L. ed. 255, P.U.R.1925E, 827, 46 Sup. Ct. Rep. 83; Missouri P. R. Co. v. Kansas ex rel. Taylor, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Chicago & N. W. R. Co. v. Ochs, 249 U. S. 416, 63 L. ed. 679, P.U.R.1919D, 498, 39 Sup. Ct. Rep. 343), obviously the latter may be compelled to continue to use present facilities to supply an existing need so long as it continues to do business in the state.

[4] The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose of state supervision is to prevent such discriminations (see New York ex rel. New York & Q. Gas Co. v. McCall, *supra,* at p. 351 of 245 U. S.) and if a public service company may not refuse to serve a territory where the return is reasonable, or even in some circumstances where the return is inadequate, but that on its total related business is sufficient (Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, *supra,* at p. 25 of 206 U. S.; Missouri P. R. Co. v. Kansas ex rel. Taylor, *supra,* at p. 277 of 216 U. S.), it goes without saying that it may not use its privileged position, in conjunction with the demand which it has created, as a weapon to control rates by threatening to discontinue that part of its service if it does not receive the rate demanded. The powers of the state, so far as the Federal Constitution is concerned, were not exceeded by the action of the Commission, in compelling appellants to continue their service in the cities named so long as they continued to do business in other parts

of the state, and to there avail of the extraordinary privileges extended to public utilities.

[5] The contentions also that the Commission was not lawfully created under provisions of the state Constitution, and that its order was void because not supported by findings, have the same and no greater force than the objection that the rate is confiscatory. Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers. They must show that the act complained of will inflict upon them some irreparable injury. As the court below held, appellants, as public service companies, are bound by the common law, if not by statute, to render their service at reasonable rates. If the rates are not shown to be confiscatory they cannot complain that the order purporting to impose them was void, for they have suffered no injury even though the order was unauthorized. Cf. Northern P. R. Co. v. Department of Public Works, 268 U. S. 39, 44, 69 L. ed. 837, 840, P.U.R. 1925D, 93, 45 Sup. Ct. Rep. 412; Chicago, M. & St. P. R. Co. v. Public Utilities Commission, 274 U. S. 344, 351, 71 L. ed. 1085, 1090, P.U.R.1927D, 340, 47 Sup. Ct. Rep. 604. We are thus brought to the question, chiefly argued and decisive of the whole case, whether the rates complained of yield such a return upon the property used and useful in the public service as avoids confiscation.

Gas is sold by the United Company to the Warfield Company at the state line at 30 cents per 1,000 cubic feet, but in view of the history and intercorporate relations of the appellants it is not contended that this contract rate is of any controlling significance in determining the propriety of the rate fixed by the Commission. For this purpose appellants do not deny that they, with respect to their entire property and business, may be treated as a unit and we so treat them. They contend here, as in No. 4, that all their property used and useful in producing the gas in West Virginia and elsewhere and in transporting and distributing it to consumers in the Kentucky cities should enter into the calculation of the rate base.

Appellants, through ownership in fee and leases or contracts on a rental or royalty basis, control the production of natural

gas from 814,910 acres of land. A part of this area, the so-termed "proven" territory, is at present being used in production, the remainder being held in reserve as either "probable" or "unfavorable" sources of future production. Their principal items of property consist of the interest in this acreage, working capital, buildings, machinery, mains, pipes, compressors, and other equipment used in the production and distribution of gas.

The valuations of the entire business in the two states made respectively by the appellants and the court below as of December 31, 1923, are as follows:

Value claimed by appellants:	
Physical property	$22,274,274
Gas lands, leaseholds and rights	36,449,176
General overhead charges	6,357,046
Working capital	990,000
Going concern value	8,423,105
	$74,493,601
Value as found or assumed by the court below:	
Physical property	$22,274,274
Gas lands, leases and rights (book value)	6,732,920
Overheads	4,009,370
Working capital	999,000
Going concern value	3,000,000
	$37,015,564

As will be observed the difference in these estimates of value is due chiefly to the difference in value ascribed by each to the gas rights and leaseholds. Appellants, as will more fully appear, reached their claimed value by an estimate by experts of the profits to be derived from the sale, in an unregulated market, of the quantity of gas estimated to underlie the proven and probable areas. The court below found that the value of appellants' gas field did not exceed its "book cost," which it took to be $6,732,-920. This figure, however, included oil production acreage amounting to $389,591—leaving $6,343,329 as the book value of the entire gas field.

Appellants contend that for the purpose of determining whether the rate is confiscatory, the regulated business in Kentucky must be separately considered and it is immaterial whether or not a fair return is being made on the entire business, a part of which is unregulated. By taking the value of that property used exclusively in this regulated business and allocating the gas fields

and other property used jointly in the two classes of business, the former on the basis of the volume of gas supplied to each type of business, appellants conclude that, if their valuation of their gas rights be accepted, a composite percentage of 11 per cent of the total value is to be allocated to the regulated business. To establish that the rate is confiscatory they accept the conclusions of the court below as to the value of all items of property except the gas lands and leases and, substituting for that item their own minimum valuation of $30,000,000, they arrive at a hypothetical rate base for their entire property of $60,282,644. The value of the 11 per cent of this property properly allocable to the regulated business in Kentucky is thus set at $6,631,091. This valuation, on the basis of 14 per cent return (1½ per cent depreciation, plus 4½ per cent amortization, which items the court below deemed liberal plus an 8 per cent return), would thus entitle appellants to earn $867,309, substantially more than the actual earnings of the regulated business, shown to be $749,839 in 1923, at the 32-cent rate. Appellants do not seriously question the sufficiency of the allowance for depreciation of the 8 per cent return. The 4½ per cent allowed for amortization, calculated on the rate base, is more than sufficient to replace appellants' entire property at the end of eighteen years, the estimated life of the gas field.

In assigning to their total property a value of $74,493,601 and in concluding that the prescribed rate is confiscatory because of its effect on the regulated business alone, appellants make certain assumptions, all of which are challenged. In the view which we take, and for present purposes only, we likewise make those assumptions without determining their validity. They are (a) that in the case as presented, present reproduction value of property used and useful in the business, if ascertainable, is to be taken as the rate base; (b) that under the circumstances of this case it is not enough that the return on appellants' business as a whole is remunerative, but earnings of the property used in or properly allocated to the Kentucky regulated business must be separately considered in ascertaining whether the rate is confiscatory; (c) that both proven and probable areas of appellants' gas acreage, whether shown to be presently productive or not, if

acquired in a prudent administration of appellants' business, are to be included in the valuation for rate-making purposes; (d) that depreciation and amortization are to be calculated on the basis of the present value of the property rather than upon the original cost or investment; (e) that, although entitled to earn a fair return on the present value of their gas leases, the "delay rentals" paid upon them pending drilling and development are properly chargeable to operating expense.

Making these assumptions, it is apparent that the disposition of the present question must turn, as appellants argue, principally upon the value to be assigned to the gas rights, although in certain aspects of the case a minor consideration may be the proportion of profits from the sale of gasoline extracted from the gas which should properly be included in the net earnings of the regulated business.

[6] The burden of proving the value of property on which they are constitutionally entitled to earn a fair return rests upon the appellants and, to justify judicial interference with the action of state officers in fixing the rate assailed, must be supported by clear and convincing evidence. Knoxville v. Knoxville Water Co. 212 U. S. 1, 16, 53 L. ed. 371, 381, 29 Sup. Ct. Rep. 148. Of the total of 814,910 acres embraced in the gas field, controlled by appellants or subsidiaries, 41,969 acres are owned in fee. The remainder is controlled by lease or contract. This acreage, although concededly well selected for purposes of economical development and avoiding loss of gas by drainage, is not in a solid block; rather it is in widely scattered areas; much of it lies adjacent to or is interspersed with gas fields controlled by others. Leases for fixed periods and so long after as gas is found in paying quantities have been obtained by appellants by payment of small bonus payments. The leases vary in their terms, but a typical lease gives the lessee the right to drill for gas for ten years, with the privilege of renewal at a fixed small annual delay rental, varying from 25 cents to $2 per acre, materially increased in the form either of a fixed rental or a royalty if and when production is established. They are customarily renewed from eighteen months to a year before expiration and for renewal an additional bonus is paid.

The actual cost on this basis of appellants' gas field is not shown, but it appears to have been substantially less than the book value assigned to it. It was stated on the argument that these leases, not only singly but in blocks, are sold in open market, but their market price appears not to have been established.

[7] Appellants do not accept either cost or market value as the basis of value of their gas rights. Instead they urge that their assembled holdings of gas rights are unique in that they cannot be reproduced and that their value depends largely upon their peculiar nature and situation. They rest their claim to a largely enhanced value over book value upon alternative theories supported by two classes of expert testimony. Appellants' experts, on the basis of geological and mining engineering data, and especially by ascertaining the existing rock pressure of the gas in various pools and by comparing the rate of decrease of rock pressure with the amount of gas produced from these pools in the same period of time, arrived at an estimate of the total volume of gas underlying the proven and probable territory. The results reached by this method were checked by comparison with the actual experience in gas production from selected pools and wells. As a final outcome of these calculations it was estimated that there were underlying the 136,384 acres of proven territory and available for use 249,100,000,000 cubic feet of gas, and in the 126,208 acres of probable territory 414,600,000,000 cubic feet. With respect to the probable territory, there were no production or pressure records to aid the experts in the preparation of their estimate. In calculating the volume of gas in this area they had recourse to comparison with the nearest pools in the same geological structure. This method was characterized by the witness using it as "difficult and uncertain" and as "much less trustworthy" than that applied to the proven territory.

These calculations are supplemented by testimony that in Pittsburgh there is an unregulated market for natural gas used for industrial purposes at 35 cents per 1,000 cubic feet, which would, on an estimated changing schedule of annual production, absorb in eighteen years the total estimated reserve of gas in appellants' gas field. At this price, natural gas, it was said, could compete successfully in Pittsburgh, for industrial purposes,

with gas produced from soft coal at the prevailing price of $2.75 a ton at the mine. After calculating the cost of getting this gas to the market, distant 130 miles from the nearest point on appellants' mains, providing for all construction costs including the cost of plant and transmission line, the gas when marketed, it was estimated, would pay a fair return upon investment, repay taxes and investment, and leave a balance, when discounted so as to give present value, of $32,458,129. A second witness, taking 30 cents as the market price of gas in Pittsburgh and deducting transportation costs, concluded that the gas in the ground is worth 5 cents per 1,000 cubic feet and arrived at a higher value, $33,155,421. To this latter estimate he added the present estimated cost of acquiring the 552,319 acres of improbable or unfavorable territory at $5.96 per acre, or $3,293,754, making a total estimated present value of appellants' gas field of $36,449,176. In this connection there is evidence, which appears to be unchallenged, that the average cost of acquiring unoperated acreage during 1921 to 1923 was 83 cents per acre, and that in 1923 appellants acquired 15,184 acres at a cost of 66 cents per acre.

Appellants' second class of expert testimony is that of men experienced and interested in the production and marketing of natural gas, who purported to assign to appellants' gas field what was described on the argument as its present exchange value or the price which the property would bring if sold by a willing seller to a willing buyer. Three such witnesses testified to a present value of appellants' gas field in amounts varying from $30,000,000 to $35,000,000 and a fourth fixed the value at $45,000,000. Examination of their testimony discloses that these estimates were not based on prevailing prices for gas leases or on actual sales, but, as in the case of the geological and engineering experts, upon an estimated or assumed exhaustible supply of gas available to appellants until exhausted, and upon a predictable price for natural gas in unregulated markets through a future period of about eighteen years. Common characteristics of both methods of valuation, therefore, are the estimation on uncertain bases of the volume of gas available and of the price at which it may be sold through a long future period.

A point considered below and argued here is that gas in the

earth is not capable of ownership, but we assume that appellants' leases and contracts give them complete legal power of control over the gas available beneath the surface of the area embraced in the gas field, so far as it may be brought under physical control. We assume also that the gas is now present in substantially the volume indicated and we lay to one side the speculative character of the assumption that the gas in that volume, despite its fugitive character and its possible drainage into other fields not under appellants' control, will remain available for appropriation through the eighteen or more years required to exhaust the field.

Waiving these not inconsiderable difficulties in the way of establishing value, we pass to another and more serious difficulty. In both methods of valuation, the value of property used in a business whose rates are regulated is made to depend on an assumed earning capacity and the data relied on to establish assumed earning capacity are themselves essentially speculative—so much so as to form no trustworthy basis for the computation of value.

It is true that a part of appellants' business is not regulated at present, but it does not appear that the ultimate distribution of their product to consumers in other states will be immune from regulation either because of the interstate commerce clause (Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 64 L. ed. 434, P.U.R.1920E, 18, 40 Sup. Ct. Rep. 279; Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268), or for other reasons, and there can be no reasonable assumption that it will be. The unique character of appellants' control over a natural product, limited in amount, asserted here as a basis of value, the obvious necessity of securing franchises or special privileges to enable them to distribute their product to consumers under the conditions assumed, and other circumstances which subject them to regulation in Kentucky and West Virginia, make inadmissible the assumption that the price to consumers would remain unregulated elsewhere.

And in other respects the assumed earning capacity is so want-

ing in probative force as to require its rejection in the circumstances here disclosed. It rests on a prediction, feebly made, that the estimated amount of gas will be available as required through a period of eighteen years; that natural gas so transported and used as a fuel will command a price of from 30 to 35 cents per 1,000 cubic feet through that period in a market yet to be established despite the changes wrought by invention and improved business and manufacturing methods; and a further prediction not only of what plant and equipment must be constructed and maintained to effect delivery of the gas for this period to consumers in the city of Pittsburgh, but also of the cost through a like period, of the construction, maintenance, and operation of that plant and equipment. Such predictions can only be made on the basis of data which are not and cannot be known, and most of which are in the highest degree speculative. Such a process of estimating value is without any known sanction.

[8] On the record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign to it any greater value than that which they appear to have assigned to it on their books. This book value, therefore, may be accepted, not as evidence of the real value of the gas field, but as an assumed value named by the appellants, which, on the evidence presented, cannot reasonably be fixed at any higher figure.

We likewise find no persuasive ground for not accepting as substantially correct the amount of $30,282,644 fixed by the court below as the maximum value to be assigned to those items of appellants' property other than the gas reserve, rather than $38,044,425, appellants' outside figure for those items. But to avoid unnecessary discussion of them in detail and for present purposes, appellants' valuation of all these items may be conceded to be correct. If we restate appellants' claimed valuation of their property by substituting for their estimate of the value of the gas rights their book value (after deduction for oil acreage) of $6,343,329, we arrive at a total assumed maximum valuation of appellants' entire property of $44,387,754. Taking

12 per cent[1] of this total, or $5,326,530, as the largest amount which could be allocated to the Kentucky business, a return upon it of 14 per cent (8 per cent plus 1½ per cent depreciation, plus 4½ per cent amortization) would amount to $745,714, an amount less than the actual return.

[9] Appellants also contend that the court below erroneously included in the earnings of the regulated business the sum of $65,166, or 50 per cent of the net proceeds of the sale of gasoline extracted, before sale, from the gas sold in the regulated business, on the ground that this amount exceeded the profits from this branch of appellants' business as reflected on their books.

In the process of extracting gasoline from natural gas, the gas flows from the field to the extraction plant, where the gasoline is taken out, the residual gas being returned to the transmission system for distribution to consumers. In the production of this gasoline, therefore, joint use is made of the gas, gas field and certain facilities of the gas company. This joint use requires a prorating of joint investment and expenses and of the return from the joint enterprise. Formerly, appellant United Company maintained and operated its own gasoline extracting plant. The West Virginia Public Service Commission having held that 50 per cent of the net return from the sale of gasoline should be credited to the gas business, the United Company organized a corporation, the Virginia Gasoline & Oil Company, and conveyed to it its gasoline extraction plant, receiving the stock of the

[1] Various witnesses allocated to the Kentucky regulated business an amount of property used for "production" (including the gas field) varying from 7.1 per cent to 10.49 per cent, and a percentage of property other than "production" ranging from 9.0 per cent to 12.07 per cent—or for the entire property as a unit, from 8.4 per cent to 11 per cent. No witness testified that there was a composite percentage which could be taken generally to represent the part of appellants' entire property used in the regulated business regardless of the varying values assigned to different items of property. Appellants have used this last figure, 11 per cent, in their calculations, and do not contest its validity. This percentage appears to include some property located in Kentucky but not actually used in the local regulated business. In our own computation we have, for convenience, taken 12 per cent as the highest possible percentage applicable, and as the figure most favorable to appellants.

new corporation in exchange. Later it turned over this stock to its own stockholders, of which there are but two, both corporations, in the same proportions in which they held stock in the United Company. It entered into a contract with this subsidiary by which it receives one eighth of the gross profit from the gasoline extracted. The Commission and the supreme court of West Virginia, in Charleston v. Public Service Commission, 95 W. Va. 91, P.U.R.1924B, 601, 120 S. E. 398, in which the United Company was a party, held that 50 per cent was a fair share of the net return of the subsidiary's business attributable to appellant United Company, and this was the conclusion adopted by the court below.

We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary or a corporation owned by its own stockholders. Cf. Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 345, 36 L. ed. 170, 179, 12 Sup. Ct. Rep. 400. We recognize that a Public Service Commission, under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility; and common ownership is not of itself sufficient ground for disregarding such intercorporate agreements when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere. Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S. 276, 288, 67 L. ed. 981, 986, P.U.R. 1923C, 193, 31 A.L.R. 807, 43 Sup. Ct. Rep. 544; Houston v. Southwestern Bell Teleph. Co. 259 U. S. 318, 66 L. ed. 961, P.U.R.1922D, 793, 42 Sup. Ct. Rep. 486.

But this case is not of that class. It is not without significance that the West Virginia court in considering this question had before it previous findings of its Commission, based upon actual contracts for gasoline extraction, where the parties, dealing at

arm's length, had agreed upon a 50 per cent division. Credible evidence was introduced below tending to show that expenses on property used jointly by the two companies and properly allocable to the gasoline company had been borne by the gas companies to an amount in excess of the return received by them from the gasoline extraction. It likewise was shown, the evidence not being challenged by appellants, that the extracting company, during the years 1917 to 1922 inclusive, after allowing appellants 50 per cent of the net earnings for the extraction privilege, would have earned not less than 102 per cent of its capital investment in each year. The average yearly profit during this period was 119.75 per cent. In 1923 its net return on this basis was 80.40 per cent. Making allowance for fluctuation in market prices and other common business hazards, we do not think it would be difficult to induce capital to seek investment on the basis of this division of net earnings. In such circumstances we think no adequate reason is shown for not including in the appellants' earnings 50 per cent of the net proceeds from the gasoline extraction.

Appellants' computation of value and of earnings is assailed at many other points, but fully conceding, for present purposes only, every contention made by them except those which we have discussed, namely, the value of appellants' gas rights and the division of return from gasoline extraction, the appellants have failed to show that the rate imposed is confiscatory, or otherwise such as to call for the interference of a court of equity.

Affirmed.

Mr. Justice McReynolds concurs in the result.

Note.—A similar decision was rendered in United Fuel Gas Co. v. Public Service Commission, U. S. Adv. Ops., Oct. Term, 1928, p. 112.

UNITED STATES SUPREME COURT.

ALBERT S. WILLIAMS, Commissioner of Finance of Tennessee et al.

v.

STANDARD OIL COMPANY OF LOUISIANA.

(No. 64.)

ALBERT S. WILLIAMS, Commissioner of Finance of Tennessee et al.

v.

TEXAS COMPANY.

(No. 65.)

(— U. S. —, 73 L. ed. —, — Sup. Ct. Rep. —.)

Constitutional law — Due process — Business affected with public interest.

1. A state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is affected with a public interest, p. 453.

Public utilities — What constitutes public interest.

2. A business or property in order to be affected with a public interest so as to justify regulation by the state must be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public, p. 453.

Public utilities — Business affected with public interest.

3. A business is not affected with a public interest so as to warrant regulation by the state merely because it is large or because the public are justified in having a feeling of concern in respect of its maintenance, p. 453.

Public utilities — Sale of gasoline.

4. Gasoline is one of the ordinary commodities of trade and its sale and distribution, however large, is not so affected with public interest as to justify regulation by the state legislature, p. 454.

Constitutional law — Waiver of constitutional rights — Corporations.

5. The state may not impose upon foreign corporations as a condition to doing business within the state restrictions which would require the relinquishment of rights otherwise guaranteed by the Federal Constitution, p. 454.

Statutes — Constitution — Validity — Saving clause.

6. The general rule is that the unobjectionable part of a statute otherwise invalid cannot be held separable notwithstanding a saving

clause, unless it appears that standing alone legal effect can be given to it and that the legislature intended the provision to stand in case others included in the act and held bad should fall, p. 454.

Statutes — Construction — Saving clause.

7. In the absence of a saving clause or legislative declaration of the consent of the legislature that an act should be divisible, the presumption is that the legislature intended the act to be effective as an entirety or not at all, p. 455.

Statutes — Construction — Saving clause.

8. The effect of a saving clause in a statute is to create a presumption that the legislature intended valid parts of the act to stand in case other parts failed, and this presumption of divisibility must be overcome by considerations which would make evident the inseparability of its provisions or the clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with the remainder, p. 456.

Public utilities — Regulation of gasoline business.

9. Provisions of a statute creating a department for the regulation of the sale and distribution of motor fuels, and creating a personnel, organization, and other details were held to be mere adjuncts of the price-fixing provisions and mere aids to their effective execution, and consequently inseparable and ineffective where the power of the state to regulate the rates for such business was held unconstitutional, p. 456.

Constitutional law — Due process — Discrimination — Gasoline sale.

10. Provisions of an act respecting rebating and discrimination in the sale and distribution of gasoline were held to be unconstitutional restrictions upon the right of the private dealer to fix his own price for such commodity, which was not affected with public interest, p. 457.

(HOLMES, J., dissents.)

[January 2, 1929.]

APPEAL from decree of United States District Court granting an injunction to prevent state officers from enforcing a statute attempting to regulate the sale and distribution of gasoline; decree of lower court affirmed. See same case below, 24 F. (2d) 455.

Appearances: Charles T. Cates, of Knoxville, Tennessee, and James J. Lynch, for appellants; John W. Davis, of New York city, and H. Dent Minor, of Memphis, Tennessee, for appellee in No. 64; John B. Keeble, of Nashville, Tennessee, for appellee in No. 65.

Mr. Justice **Sutherland** delivered the opinion of the Court:

These cases were considered together by the Court below and

are submitted together here. In both the validity of a statute of Tennessee is assailed as contravening the Federal Constitution. Appellee in No. 64 is a corporation organized under the laws of Louisiana, and appellee in No. 65 is a corporation organized under the laws of Delaware. From a time long prior to the passage of the statute, both have been engaged and are now engaged in the business of selling gasoline in the state of Tennessee.

The statute was adopted in 1927. Its purpose and effect are to fix prices at which gasoline may be sold within the state. A division of motors and motor fuels is created in the Department of Finance and Taxation, and authorized to collect and record data concerning the manufacture and sale of gasoline, freight rates, differentials in price to wholesalers and retailers, the cost and expense of production and sale, etc. The information thus collected is made available for use by the Commissioner of Finance and Taxation in the regulation of prices at which gasoline may be sold in the state. Permits for such sale are to be issued subject to the approval of the Commissioner but only at the prices fixed and determined. Prices of gasoline are to be fixed with a proper differential between the wholesale and retail price. Rebates, price concessions, and price discrimination between persons or localities are forbidden. The prices first are to be stated by the applicant for a permit, and if not approved by the superintendent of the division, are to be determined by that official, with a right of review by the Commissioner and finally by the courts. Public Acts (Tenn.) 1927, p. 53, Chap. 22. By a general statute, Shannon's Tennessee Code, § 6437, a violation of the act is a misdemeanor and is punishable by fine and imprisonment. Pressly v. State, 114 Tenn. 534, 538, 86 S. W. 378, 69 L.R.A. 291, 108 Am. St. Rep. 921.

Appellees brought separate suits in the Court below to enjoin the state officers named as appellants from carrying out their intention to enforce the act and institute criminal proceedings for violations of it against appellees, respectively, and to have the act declared unconstitutional and void. Under the facts alleged, the suits were properly brought. Terrace v. Thompson, 263 U. S. 197, 214, 68 L. ed. 255, 273, 44 Sup. Ct. Rep. 15; Tyson

& Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 427, 428, 71 L. ed. 718, 721, 47 Sup. Ct. Rep. 426, 58 A.L.R. —.

The principal ground of attack, and the only one we need to consider here, is that the legislature is without power to authorize agencies of the state to fix prices at which gasoline may be sold in the state, because the effect will be to deprive the vendors of such gasoline of their property without due process of law in violation of the 14th Amendment. Appellees applied for a temporary injunction against appellants, upon which there was a hearing, and the court below, consisting of three judges (§ 266, Judicial Code, U. S. C. title 28, § 380), granted the injunction as prayed. 24 F. (2d) 455, *sub nom.* Standard Oil Co. v. Hall.

[**1–3**] It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is "affected with a public interest." Wolff (Charles) Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, P.U.R. 1923D, 746, 43 Sup. Ct. Rep. 630, 27 A.L.R. 1280; Tyson & Bro.-United Theatre Ticket Offices v. Banton, *supra;* Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 Sup. Ct. Rep. 506, 52 A.L.R. 163; Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 Sup. Ct. Rep. 545, 56 A.L.R. 1327. Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this court, beginning with Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, that phrase, however, it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. Tyson & Bro.-United Theatre Ticket Offices v. Banton, *supra,* p. 434. Negatively, it does not mean that a business is affected with a public interest merely because

it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Id. p. 430. The meaning and application of the phrase are examined at length in the Tyson Case, and we see no reason for restating what is there said.

[4] In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase "affected with a public interest." Those decisions control the present case.

There is nothing in the point that the act in question may be justified on the ground that the sale of gasoline in Tennessee is monopolized by appellees, or by either of them, because, objections to the materiality of the contention aside, an inspection of the pleadings and of the affidavits submitted to the lower court discloses an utter failure to show the existence of such monopoly.

[5] Nor need we stop to consider the further contention that appellees, being foreign corporations, may not carry on their business within the state except by complying with the conditions prescribed by the state. While that is the general rule, a well-settled limitation upon it is that the state may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution. Frost & F. Trucking Co. v. Railroad Commission, 271 U. S. 583, 593, et seq., 70 L. ed. 1101, 1104, P.U.R.1926D, 483, 46 Sup. Ct. Rep. 605, 47 A.L.R. 457, where the applicable decisions of this Court are reviewed.

[6] Finally, it is said that even if the price-fixing provisions be held invalid other provisions of the act should be upheld as separate and distinct. This contention is emphasized by a ref-

erence to § 12 of the act, which declares "that if any section or provision of this act shall be held to be invalid this shall not affect the validity of other sections or provisions hereof."

In Hill v. Wallace, 259 U. S. 44, 71, 66 L. ed. 822, 831, 42 Sup. Ct. Rep. 453, it is said that such a legislative declaration serves to assure the courts that separate sections or provisions of a partly invalid act may be properly sustained "without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part." But the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, "standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." The question is one of interpretation and of legislative intent, and the legislative declaration "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." Dorchy v. Kansas, 264 U. S. 286, 290, 68 L. ed. 686, 689, 44 Sup. Ct. Rep. 323.

[7] In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety. This is well stated in Riccio v. Hoboken, 69 N. J. L. 649, 662, 55 Atl. 1109, 63 L.R.A. 485, where the New Jersey court of errors and appeals, in an opinion delivered by Judge Pitney (afterward a Justice of this Court), after setting forth the rule as above, said:

"In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process."

Compare Illinois C. R. Co. v. McKendree, 203 U. S. 514, 528–530, 51 L. ed. 298, 304, 305, 27 Sup. St. Rep. 153; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 501, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; Butts v. Merchants & M. Transp. Co. 230 U. S. 126, 132, et seq., 57

L. ed. 1422, 1424, 33 Sup. Ct. Rep. 964. And see 1 Cooley, Const. Lim. 8th ed. 362, 363 and note.

[8] The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains.

[9] In the present case, it requires no extended argument to overcome the presumption and to demonstrate the indivisible character of the act under consideration. The particular parts of the act sought to be saved are found in §§ 1, 2, 3, 4, and 10. Section 1, after a preamble in respect of the importance of controlling the sale of gasoline and a declaration that such sale is impressed with a public use, creates the Division of Motors and Motor Fuels as already stated. Section 2 requires the superintendent of the division and other employees to make investigations, collect and record data concerning the manufacture and sale of gasoline, the cost of refining, freight rates, differentials in wholesale and retail prices, costs and expenses incident to the sale, methods employed in the distribution of gasoline, and other data and information as may be material in ascertaining and determining fair and reasonable prices to be paid for gasoline. This information is declared to be available for use in the regulation of prices and for the inspection and information of the public. The superintendent is directed to issue permits for the sale of gasoline at prices fixed and determined as provided in other parts of the statute. Section 3 makes it unlawful for anyone to engage in the sale of gasoline without first having obtained a permit signed by the superintendent and approved by the Commissioner of Finance and Taxation, for which permit application must be made in accordance with and in compliance with all the requirements of the act. Section 4 requires that the application shall set forth whether the applicant proposes to do a wholesale or retail business, or both, the number and location of the different places where he is to operate and other like in-

formation. He must also set forth the price or prices at which he is at the time selling gasoline, the cost price thereof, including various items which enter into the price, and the price at which he proposes to sell. Section 10 imposes a special permit tax of $10 per annum for each place of sale at wholesale, and $1 per annum for each retail service station or curb pump. The tax thus imposed is constituted a special maintenance fund to aid in defraying the expenses of the division of motors and motor fuels.

The bare recital of these details shows conclusively that they are mere adjuncts of the price-fixing provisions of the law or mere aids to their effective execution. The function of the division created by § 1 is to carry these provisions into effect, and if they be stricken down as invalid the existence of the division becomes without object. The purpose of collecting the data set forth in § 2 is to furnish information to aid in the fixing of proper prices. The requirements in § 3 that a permit must be obtained before any person can engage in the business of selling gasoline and those in § 4 that the application therefor must state the character of the business, the number and location of the places where business is to be carried on, the price or prices at which the applicant is then selling gasoline, the cost price thereof, and the price at which he proposes to sell, obviously constitute data for intelligently putting into effect the price-fixing provisions of the law or means to that end. The taxes imposed by § 10 are solely for the purpose of defraying the expenses of the division of motors and motor fuels, and since the functions of that division practically come to an end with the failure of the price-fixing features of the law, it is unreasonable to suppose that the legislature would be willing to authorize the collection of a fund for a use which no longer exists.

[10] Appellants also insist that certain provisions in respect of rebating and discrimination contained in § 8 of the act are separable. Those provisions are that it shall be unlawful to grant any rebate, concession, or gratuity to any purchaser for the purpose of inducing the purchaser to purchase, use, or handle the gasoline of the particular dealer, and that it shall likewise be unlawful to discriminate for or against any purchaser by selling

at different prices to purchasers in the same locality or in different localities. It seems clear that these provisions are mere appendants in aid of the main purpose; but, if treated as separable, they are unconstitutional restrictions upon the right of the private dealer to fix his own prices and fall within the principle of the decisions already cited. See especially Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 Sup. Ct. Rep. 506, 52 A.L.R. 163.

This interpretation of the various provisions of the act is fortified by a requirement of the Tennessee Constitution (article 2, § 17) that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title." It is fair to conclude, and there is nothing to suggest the contrary, that in the passage of the present act the legislature intended to observe this requirement and confine the provisions of the act to the one subject of price-fixing.

Accordingly, we must hold that the object of the statute under review was to accomplish the single general purpose which we have stated, and, that purpose failing for want of constitutional power to effect it, the remaining portions of the act, serving merely to facilitate or contribute to the consummation of the purpose, must likewise fall.

Decrees affirmed.

Mr. Justice Brandeis and Mr. Justice Stone concur in the result.

ALABAMA PUBLIC SERVICE COMMISSION.

RE ALABAMA POWER COMPANY.

[Docket No. 5454.]

CITY OF MOBILE

v.

ALABAMA POWER COMPANY.

[Docket No. 5494.]

Return — Rate reductions — Necessity for complete valuation.

1. Studies of utility properties and the cost of their operation, to- P.U.R.1929A.

gether with analyses of revenues under current and proposed rates, were held to warrant a conclusion that a substantial rate reduction could be made, notwithstanding the fact that investigations and complete findings of value had not been completed where the public were obviously entitled to great savings that would otherwise be postponed, and where a statute permitted the Commission to prescribe rates prior to valuation, p. 466.

Rates — Block rates — Heavy duty appliances.

2. The use of block rates for domestic electric consumers designed when lighting was the chief use of electricity was held to be unlikely to encourage the larger use and rapidly growing demand of heavy duty appliances in the small household, p. 467.

Rates — Electricity — Heavy duty appliances — Promotional room rate.

3. A rate calculated on the basis of the number of rooms in a domestic residence was proposed in order to stimulate an increased use of heavy duty household appliances, p. 467.

Rates — Electricity — Promotional rate — Economical use.

4. The Commission in approving of a promotional rate to encourage use of household appliances based on the number of rooms in the average residence gave weight in its order to the contention that such rate would increase the bills of consumers with large houses using very little current, and of a class least able to bear an increase in the cost of living, p. 468.

Rates — Fixed charges — Minimum charge — Return as a whole.

5. While consideration must be given to the fixed costs of serving each customer in fixing a minimum rate, as long as the utility is permitted to earn a fair return from its operations as a whole, the matter of the distribution of the service cost among its different consumers becomes of concern chiefly between such consumers, p. 468.

Discrimination — Commission powers — Equity between customers.

6. There are limits, under the law, and as a matter of equity between customers, beyond which the Commission cannot reasonably go in the distribution of the cost of service among different classes of consumers, p. 468.

Rates — Service charge — Large houses — Electricity.

7. The larger homes should in justice pay a somewhat larger service charge than the small homes, provided that to each is offered the same opportunity of obtaining a low rate for additional energy consumed, p. 469.

Rates — Meters — Promotional room rate — Use of appliances.

8. A domestic electric rate calculated to promote the use of heavy duty household appliances without, at the same time, burdening the small domestic consumers using current for lighting only, afforded to each customer a very low rate for use of energy over and above the first five kilowatt hours, eliminating thereby the use of more than one meter, p. 469.

P.U.R.1929A.

Rates — Electricity — Optional room rate.

9. A proposed rate schedule for domestic electric service based on the so-called room rate was made an optional alternative with a previously used block rate by permitting customers electing the latter to apply, within a limited time in writing, for a return to the old rate, thereby allowing the new rate to customers finding it advantageous without penalizing other consumers having houses with a large number of rooms but using a small amount of energy, p. 469.

Rates — Procedure — Res judicata.

Statement that a particular rate, except at the particular time and under the particular circumstances of its adoption, can in no sense be said to be res judicata, and where conditions have changed and new and additional evidence is available, the rates prescribed one day might be changed the next, p. 467.

Rates — Cost of service — Electricity.

Discussion of the cost of service as a strict basis for the rate making of electric and other utilities, p. 469.

[December 31, 1928.]

PETITION by an electric company for revised rates and complaint by city against alleged excessive electric rates; rates adjusted in accordance with opinion.

Appearances in Docket No. 5454: Perry W. Turner, Attorney for petitioner; Sidney J. Reaves, Mayor, and J. F. Matthews, City Attorney, Anniston, D. C. Jones, Mayor, Roanoke, R. M. Jones, for Florence, Sheffield, Tuscumbia, and city of Muscle Shoals; J. A. Brock and D. F. Posey, New Brockton, W. E. Weir, Mayor, Gadsden, Grover Flowers, Mayor, Ozark, R. C. Keeler, Mayor, Union Springs, W. R. Dean, Mayor, Goodwater, A. L. Crumpton, City Attorney, Ashland, C. E. Oliver, Mayor, Dadeville, J. W. Jones, Mayor, Lineville, J. Bruce Airey, Mayor, Wetumpka, T. J. Rowell, Mayor, Selma, I. B. Weston, for Louisville; J. S. Daniel, Tuscaloosa, for Mobile & Ohio shop employees; E. W. Norton, Attorney, Clayton, J. R. Dunston, Roanoke, for employees of W. A. Handley Cotton Mill; John McLaughlin, Montgomery, T. C. Acree, Dadeville, M. M. Hutchens, Huntsville, Lewis Crew, Goodwater, A. P. McLendon, Goodwater, P. G. Cosper, Childersburg, Hector D. Lane, Courtland, J. E. Orman, Russellville, C. J. Randolph, Decatur, W. A. Handley, Roanoke, J. P. Wilson, A. R. Guthrie, H. L. Luscher, A. C. Denby, Mobile, J. M. Clements, Clayton, S. D. Fuller,

New Brockton, U. F. Tyson, T. B. Lee, E. P. Grant, Louisville, E. O. McCord, Gadsden, H. B. Battle, Montgomery, Norfleet Harris, Mayor, and S. H. Sprott, City Attorney, Tuscaloosa, Vincent F. Kilborn, City Attorney, Mobile, Harry T. Hartwell, as City Commissioner of Mobile and for Association of Mayors of Alabama; L. C. Bell, for Northport; W. W. Seay, Tuscaloosa Chamber of Commerce, J. B. Kramer, Cullman, Secretary Mayor's Association of Alabama, J. B. Sloan, Oneonta Service Club, W. S. Estep, for city of Florence.

Appearances in Docket No. 5494: Vincent F. Kilborn, City Attorney, Mobile, Perry W. Turner, Attorney, Birmingham, Francis J. Inge, Mobile, for defendant.

By the **Commission**: The above styled petition of Alabama Power Company, hereinafter referred to as the Company, was filed with the Commission on September 24, 1928. Under the petition the Company proposes three new rate schedules for general application, with a few exceptions, to all domestic and commercial customers in the state of Alabama. Notice of the filing of said petition, with copy of the proposed rates, was given by the Commission to the mayors of all cities and towns served by the petitioner and to many other representatives of customers throughout the state. The Company published in newspapers throughout the state notice of its filing of the petition with statement showing the domestic rate schedule, service classification A–1, and the effect of such schedule as compared with existing rates.

The Commission has held two hearings upon this petition, the first being held in Montgomery on October 24, 1928, and the second in Birmingham on November 20, 1928.

As shown by appearances entered in the case, widespread interest was taken by the Company's customers in the petition and in the rates proposed.

The rates proposed under said petition of the Company, our Docket No. 5454, were proposed for application in the city of Mobile as well as in other parts of the state, as shown by the petition. However, while such petition was before the Commission and subsequently to the first hearing thereon in Montgomery,

the city of Mobile filed its complaint against Alabama Power Company, alleging that the Company's existing rates in Mobile are illegal, and unreasonable, and praying that defendant be required to reinstate certain rates fixed by contract of June 8, 1910, between the city of Mobile and Mobile Electric Company and/or for such further relief as the complainant might be entitled to in the premises.

This complaint of the city of Mobile, our Docket No. 5494, was filed November 1, 1928, and was heard by the Commission in Mobile on December 13, 1928.

Inasmuch as the petition of the Company, and the complaint of the city of Mobile are both disposed of under our report and order herein, the two cases are treated in this consolidated report.

Petition of Alabama Power Company, Docket No. 5454.

At the first hearing of the Company's petition in Montgomery, on October 24, 1928, its attorney stated in substance that the Company desired to establish and make effective the rate schedules proposed under this petition for uniform application over its system, except as noted, and offered testimony of its engineers in support of the new schedule. According to the testimony offered by the petitioner, the rates proposed would have the effect substantially to reduce its revenues. The Company explained by its witnesses that it could not afford to so reduce its revenues unless it obtained a new form of rate which would permit its customers profitably to use a greater amount of energy, which, in the end, petitioner believed, would favorably affect its revenues, because of the greater consumption.

Further showing was made by petitioner's witnesses to the effect that conditions had rapidly changed during the last few years in the matter of use of electric current in the homes, due to the fact that some years ago such current was used almost exclusively for light only, whereas now electric ranges, refrigerators, and many other appliances adapted to use of electric current have been installed. Petitioner's witnesses expressed the opinion that there was a large, growing demand for use of electric energy in the homes for such purposes and that the rate here proposed for domestic service had been so designed as to permit

an increased use of electric current at rates which would permit and encourage such larger use.

Testimony was also offered by the Company showing an application of the proposed rates for domestic service to customers' bills in cities and towns differing widely in the number of customers served therein.

It appeared that under the rates for domestic use proposed, a large percentage of the Company's customers, consisting for the most part of the small users, would be subjected to a raise of their existing rates; that substantially an equal number would not be materially affected, and those remaining would receive a decrease of existing rates.

At the conclusion of the Montgomery hearing of the Company's petition, a number of those opposing the petition asked for additional time to study and consider the Company's proposals, and to serve this purpose as well as to obtain additional information from petitioner, the Commission held an adjourned hearing in Birmingham, on November 20, 1928.

At the Birmingham hearing additional appearances were entered by those representing various cities and towns, as shown in the heading of this report. At this subsequent hearing, the petitioner submitted further testimony showing the effect of the application of the proposed domestic rates to bills of customers in other towns, and through its consulting engineer, Mr. C. S. Reed, presented evidence with respect to the minimum cost incurred by the Company to serve domestic customers. This witness testified that, from his study of petitioner's property, and the properties of similar electric utility companies, such cost of rendering service amounted to from $1.50 to $2 per month for each domestic user.

At both the Montgomery and the Birmingham hearings upon this petition, mayors and other representatives of various cities, towns and communities throughout the state offered their views upon the rates proposed under the petition, particularly those proposed for domestic service. The substance of the most of such views is that the domestic rates proposed should not be approved because such rates would increase the cost of service to the small users, who are generally people least able to stand increases in

the cost of living. There were individual customers who appeared and offered approval of the rates as proposed, and other individuals who opposed such rates, basing such opposition generally upon the effect thereof upon the small user.

Hon. Harry T. Hartwell, City Commissioner of Mobile, appearing in behalf of the Association of Alabama Mayors and City Commissioners, stated that, as a representative of such association, he desired to oppose the revision of the Company's rates as proposed in its petition until after the Commission had been able to complete its valuation of the Company's properties and bring such valuation down to date. Commissioner Hartwell stated, however, that he did not desire postponement of revision of the Company's existing rates in the city of Mobile until valuation of the Company's properties could be brought down to date.

It would extend this report to too great length if we undertook to review all the testimony. What has been stated above is representative, we think, of the material evidence.

Complaint of City of Mobile, Docket No. 5494.

We have referred above to the general nature of the complaint of the city of Mobile. It appears therefrom that on June 8, 1910, a contract was entered into between the city of Mobile and Mobile Electric Company, which then served the city of Mobile in the distribution and sale of electric current, fixing certain rates. Subsequent to the enactment of the Alabama Utility Act of 1920, the Mobile Electric Company, in 1921, obtained a revision of the rates prescribed by this contract, under an order of the Alabama Public Service Commission. The Mobile Electric Company was made a part of the Gulf Electric Company by merger with the latter Company, on December 31, 1925. Subsequently, the Gulf Electric Company, Houston Power Company, and Alabama Power Company, on November 10, 1927, were consolidated.

The complaint of the city of Mobile was heard in Mobile on December 13, 1928. Considerable testimony was offered by the city as to the rates for domestic use of electric current applied by utilities in other cities and towns throughout the country. The city also offered testimony by engineering witnesses with respect to the existing rates of the Alabama Power Company in

Mobile and like rates of other utilities in comparison therewith, and other evidence going to the reasonableness of Mobile's existing rates for domestic use. It would unduly extend this report to discuss this evidence in detail.

Among other evidence offered by the city of Mobile, in support of its complaint, was what is known as the Company's "Service Classification A–3," which is the rate for domestic use now effective for the city of Montgomery, Alabama.

In response to the complaint of the city of Mobile and the evidence offered in support thereof, the Company offered as a reasonable rate to apply in Mobile for domestic use the rate which has been discussed above, proposed by the Company in said Docket No. 5454, which, as above stated, was originally proposed for application in Mobile as well as elsewhere in the state. In support of such proposed rate, the Company offered, by its consulting engineer, Mr. C. S. Reed, considerable evidence substantially similar to that offered in above named Docket No. 5454, and showing that such proposed rate would result in a large reduction to the domestic customers of Mobile, as a whole.

To such proposal, the city offered the same objection it had offered at the Birmingham hearing of the Company's petition in said Docket No. 5454, namely: that the proposed rate levied too much increase on the small users.

At the conclusion of testimony offered upon the hearing of this complaint, oral argument was made by counsel representing the city and the Company. It developed upon such argument that the city does not desire reinstatement of the entire contract entered into as above stated on June 8, 1910, between the city of Mobile and Mobile Electric Company, but only that part thereof which prescribes rates for domestic use. Counsel for Mobile, in argument, stated that the contract rate was offered, along with the other testimony, as evidence of what would now constitute a reasonable rate for domestic use to be applied in the city of Mobile. It was further stated by counsel for the city of Mobile that, under such complaint, the city did not seek revision of petitioner's rates in Mobile, except as applied to domestic use. It was shown at the hearing that many of the rates of the Company in the city of Mobile had been revised within the last year

or two, substantial reductions having been made in the total amount of approximately $125,000 per annum.

[1] For some time past the Commission has been engaged in an investigation of the properties of Alabama Power Company for the purpose of determining what revision, if any, should at this time be made in the respondent's rates or its rate structure. This proceeding has been going forward under the Commission's Docket No. 5359, and several public hearings have been held. While the investigation of the properties and the cost of operation of the Company has not as yet been completed, and cannot be completed for some months, the study of these properties and of petitioner's cost of operation, which has been made to date, the analyses of revenue under the present and proposed rates for the service here involved, considered in connection with the company's operations as a whole, warrant the conclusion that a substantial reduction in existing rates should be made to domestic users at this time.

Valuation Not a Necessary Prerequisite in Present Case.

It has been argued by some of the representatives of the public that the Commission ought not to undertake revision of the Company's rates here in issue until valuation of its properties has been completed. We do not think this position is well taken. To follow this course would postpone for several months, at least, a substantial reduction to the domestic users of the state, amounting to approximately $300,000 annually, in the aggregate.

A complete, definite and final valuation, found in accordance with our statute and the controlling decisions of the courts, may in some cases be a necessary prerequisite to determination of reasonable rates. This, in our opinion, is not the case here. It must be noted that the petitioner's own testimony is to the effect that the rates here proposed by it will reduce its revenues somewhat in excess of $100,000 annually. We find, however, under all the evidence that a much greater reduction, namely: approximately $300,000 annually may be made to these customers, and the Commission still keep within the law. Especially so, because the form of rate here prescribed, according to petitioner's testimony and experience under rate similar in principle, may be

expected to encourage much greater consumption of current in domestic service, without entailing additional cost to the Company in like proportion.

The Alabama Public Utility Act of 1920, § 27, now § 9772 of the Code of Alabama of 1923, expressly authorizes the Commission to prescribe rates of a utility prior to a valuation of its property. It would be well-nigh impossible to carry on our work if it were otherwise.

Take the case of the utility here involved. It has been engaged in making acquisitions and additions to property at the rate of some ten or twelve millions of dollars per annum since the last complete, definite, and final valuation of its property was made by the Commission, and is still making additions at this rate. If we make rate revision wait, in all cases, upon completion of valuation, found under the statute and the decisions of the courts, regulation of rates of a rapidly growing utility would practically be annulled.

Besides, it should always be remembered that a rate, except at the particular time and under the particular circumstances of its adoption, can in no sense be said to be res judicata. Tomorrow, when conditions have changed and new and additional evidence is available, the rate prescribed yesterday may reasonably be changed to accord therewith.

Changes in Domestic Use of Electric Current.

[2, 3] It is undoubtedly true, as alleged in the Company's petition, that great change in use of electric current in and about the home has taken place in recent years. Just a few years ago, electricity was used for almost no other purpose except lighting. Now there is large use, rapidly growing, of electric ranges, refrigerators, water heaters, vacuum cleaners, and many other domestic appliances, which contribute to labor-saving, sanitation and comfort.

The present so-called block rates of the Company for domestic customers, made effective when lighting was the chief use of electricity in the home, are not designed to permit the larger use for which there is a rapidly growing demand.

To meet this changed condition, the Company has proposed rates for domestic use set out in its petition as follows:

Rate.

$1 for the first five kilowatt hours consumed per month; plus 4½ cents per kilowatt hour for the next 45 kilowatt hours consumed per month; plus 3½ cents per kilowatt hour for the next 150 kilowatt hours consumed per month; plus 2½ cents per kilowatt hour for all over 200 kilowatt hours consumed per month.

The above charge for the first 5 kilowatt hours is applicable to residences of three rooms or less, and will be increased as follows:

15 cents per room for each of the next 7 rooms; plus $1 per horse power of connected motor and refrigerator load (minimum 1 horse power); plus $1 per kilowatt in excess of 7 kilowatts connected cooking and heating load.

[4] While there were some objections to the proposed rate by customers having ranges and refrigerators, now being served under Service Classification D rate, the chief and most general objection was that the rate as proposed would raise the bills of a large number of customers who make as sparing use of current as possible, chiefly for lighting only, who are represented to be, and probably are, for the most part people least able to bear increases in the cost of living. We find merit in these contentions, as is shown in our order herein.

Cost to Serve Domestic Consumers.

[5, 6] That there are certain items of cost in rendering service to a customer which are in nature fixed costs, whether or not any electricity is used, is clear to every one who understands the nature of utility operations. Such fixed costs of service include setting and removing of meters, meter repairs, meter reading, bookkeeping, collection expenses, interest charges on services and meters, and other investment costs which exist for each customer, and it is argued by the Company, through its engineers, that the increased minimum charges proposed under the petition, are designed partially to cover such fixed service costs. As stated above, petitioner's consulting engineer estimates such fixed cost

of rendering service amounts to from $1.50 to $2 per month for each domestic user.

While consideration must be given to this element in fixing a rate, as long as the utility is permitted to earn a fair return from its operations as a whole, the matter of distribution of cost of service among its different classes of customers, becomes of concern chiefly as a matter between customers. There are limits, under the law, and as a matter of equity between customers, beyond which the Commission could not reasonably go in the distribution of such costs. There are many things which must be considered, however, in this connection. Rate structures have have not yet come to the point of following strictly the cost of service basis. While the tendency is in that direction, the development ought probably to be evolutionary, not revolutionary. Whether such method of rate making can, or should, ever be strictly applied in the case of such necessities as water, light, heat, and sanitation, is a very debatable question.

[7] We make no specific finding as to such cost of service in this case. The evidence is not sufficient, nor sufficiently definite, to determine this element. Under all the evidence, we find the minimum charges proposed by the Company should be substantially reduced, as is evidenced by our order herein. At the same time, we have given what we find, under the evidence in this case, is reasonable recognition of the cost to serve. In our opinion, the larger home should in justice pay a somewhat larger service charge than the small home, provided, that to each is offered the same opportunity of obtaining a low rate for the additional energy consumed.

The Rate Herein Prescribed.

[8, 9] It was developed at the hearing of the Company's petition that certain customers now being served under Service Classification D, the lighting and cooking rate of the Company, many refrigerator installations, as well as most of the minimum and small users would receive increases in their bills. The rate form of the Company was based on an analysis of the cost of several classes of users, and, while apparently scientific in its distribution of cost among customers, nevertheless, in the judgment of

the Commission, the amount of increase upon the small user and the increases to many customers having made considerable investments in cooking, heating, and refrigerator equipment, have not been justified and should not be approved. The Commission realizes that the field of domestic electric service is one of increasing importance, but believes that the rates proposed by the Company would place too great a burden on the small user. Accordingly, we have had our engineer work out a rate, which, while similar in form to that fixed by the Company, reduces this burden on the small user and at the same time preserves the equity among customers, as we see it, without destroying the encouragement offered under this type of rate to profitable use of additional energy by all classes of customers.

The Commission estimates that the domestic rate which it prescribes below will reduce the revenues of the utility from this class of consumers not less than $300,000 a year. The Commission, in revising this rate, has given consideration to all of the objections that were advanced at the several hearings and believes it has overcome all those of any consequence.

The rate herein prescribed affords to each customer a very low rate for the use of energy over and above the first 5 kilowatt hours, and every customer can obtain additional energy at rates greatly below those formerly available under the old block rate. This new form of rate has the advantage of simplicity, as only one meter will be required for all residential use, where in the past many customers have been forced to wire their homes for two and sometimes three meters to receive adequate service under the former plan.

Customer's Option of Rates.

It is the opinion of the Commission that, in ordering a statewide revision of these rates, and in establishing a standard rate for domestic service, an option should be given those customers who may desire to remain on the old rate; therefore, no consumer is required to accept any increase. However, it is the opinion of the Commission that the standard rate prescribed in this order will prove of very great advantage to all customers of this utility, and we will, therefore, make a new rate applicable to all cus-

tomers, unless the individual customer shall elect in writing, within a limited time, prescribed in the order, to return to the old rate. In the case of Mobile, to those customers who do not desire to remain on the new standard rate, there is hereby made available for option, Service Classification A–3, which has been referred to in this proceeding as the Montgomery rate. Any customer, in Mobile or elsewhere, on the system, where the rate herein prescribed is applicable, who exercises the option above referred to, may, at any time thereafter, return to the rate herein prescribed, without further option.

Attached to this opinion and order are five exhibits showing the savings which will result by the application of the revised Service Classification A–1.

Exceptions to Application of the Rate.

As a part of our order, hereto attached, there is included a list of those classes of customers who are excepted from application of the schedule of rates here prescribed. These exceptions require no explanation, except in the case of customers who are served from the electric distribution systems at Eufaula and Enterprise. There are conditions obtaining in both these cities, brought about by action of the municipal authorities, which render us unable in this proceeding to make the rates herein prescribed available to customers in Eufaula and Enterprise.

Petitioner's Proposed Commercial Schedules.

It developed at the hearing in Birmingham that the petitioner's studies as to the effect of its proposed commercial schedules (Service Classification C–1 and D–1) had not been carried far enough to enable either the Commission or the Company to determine the effect of the proposed commercial rates on the customers or upon the Company's revenues. For this reason, consideration of such commercial classifications filed is postponed until such time as the Company has completed its studies and can furnish to the Commission the additional information requested at the Birmingham hearing. This part of the petition is continued, subject to the further orders of the Commission.

Complaint of City of Mobile.

The complaint of the city of Mobile is disposed of by making the rate herein prescribed applicable in such city, with option to any customer there, who elects in writing within the time prescribed in the order, to be served under said Service Classification A–3, referred to as the Montgomery rate.

An appropriate order is herewith issued.

ORDER

The opinion of the Commission in this proceeding is issued herewith and made a part hereof.

The premises considered, it is *ordered* by the Commission that the attached rate schedule marked "Exhibit A" and designated as Service Classification A–1, be and the same is hereby approved for application as follows:

This schedule of rates is approved as the standard rate schedule for application to all domestic customers served by the Alabama Power Company in the state of Alabama, except:

a. Existing customers as of the date of this order who shall elect to take old rates.

b. Customers served under Service Classification A–5.

c. Customers served from the electric distribution systems at Eufaula and Enterprise.

d. Rural customers served on rural rates, Service Classification E and GE.

e. Rural customers as defined under Service Classification E but now served at standard rates with or without special minimums which under the approval of Service Classification E by this Commission will be transferred to the rural rate on June 30, 1930.

f. Customers served by the isolated plant at Florala, Alabama.

It is *further ordered* that, due to the practice of petitioner of continuous meter reading and billing for this class of customers, it will be impossible to make the new rate effective at one time to all of the seventy thousand customers that will be affected by this change. The Commission, however, feels that the change should

be effective as soon as possible and the rate, therefore, is made effective for bills of present customers dated February, 1929. This schedule shall be effective for all new customers connected to the system of the Company from and after the date of this order.

It is *further ordered* that all consumers as of the date of this order may, on receipt of the first bill under the new rate, have the right for a period of forty-five days from date of such bill, to elect to return to the schedule previously applicable for his service. If election is made by the consumer to return to his old rate, notice in writing must be given to the Commission and to the nearest office of the Company within said prescribed time, that he desires to remain on the old rate, and the Company shall comply with his request.

It is *further ordered* that Classification A–3 is herewith approved as the optional rate applying under this order for residential service supplied from the electric distribution system at Mobile, Alabama. Provided that any customer, in Mobile or elsewhere on the system, where the rate herein prescribed is applicable, who exercises the option above referred to, may, at any time thereafter, return to the rate herein prescribed, without further option.

It is *further ordered* that service under this classification is subject to rules and regulations, now or hereafter in effect, approved or prescribed by the Alabama Public Service Commission.

The Commission retains full jurisdiction hereof to make such other and further orders as may be necessary or reasonable to give proper effect to this order.

Service Classification "A–1"

Residential Service

110–220 Volts, Single Phase

Availability.

Available to any consumer served from a local distribution

system of the Company for residential electric lighting, cooking, heating, refrigeration and/or power service, or any combination of these, where the total consumption can be measured by one meter, except where another service classification has been approved by Alabama Public Service Commission for such service. The combined load of motors which can be operated simultaneously shall not exceed a total of two H.P.

Delivery Voltage.

The delivery voltage to the consumer shall be determined by the voltage of the available local distribution lines of the Company, but the Company shall not be required to deliver service at a voltage of less than approximately 110 volts nor more than approximately 220 volts.

Net Rate.

80 cents for the first 5 kilowatt hours consumed per month; plus 5 cents per kilowatt hour for the next 45 kilowatt hours consumed per month; plus 3 cents per kilowatt hour for the next 150 kilowatt hours consumed per month; plus 1½ cents per kilowatt hour for all over 200 kilowatt hours consumed per month.

The above charge for the first 5 kilowatt hours is applicable to residences of three rooms or less, and will be increased 10 cents per room for each of the next seven rooms.

For ranges and heaters in excess of 10 kilowatts connected load, the above charge for the first 5 kilowatt hours will be increased by $1 per kilowatt of such excess. Where double throw switches are used, the maximum sum total of the consumer's loads, which can be operated at one time, will determine the capacity to be charged for.

For the purpose of this service classification the number of rooms will be determined upon the customary real estate basis of rating. The tables following show the rooms to be counted, whether equipped for the use of electricity or not, and those not to be counted.

To be Counted.

Ball room	Living room
Bed room	Music room
Billiard room	Nursery
Conservatory	Observatory
Den	Office
Dining room	Parlor
Drawing room	Reception hall
Gymnasium	Reception room
Dressing room	Sewing room
Kitchen	Studio
Kitchenette	Sun parlor
Library	

Not to be Counted.

Alcove	Open sleeping porch
Attic (unfinished)	Pantry
Bathroom	Piazza
Basement	Porch
Breakfast room	Portico
Butler's pantry	Reception hall (120 square feet or less)
Cellar	
Dressing closet	Storage room
Garret (unfinished)	Toilet
Hallways	Unfinished room
Laundry	

Each 100 watts in excess of the first 200 watts of connected load of yard, barn, garage, stable, or other outhouse lighting will be counted as one room when no living quarters are included. Empty lamp sockets in such cases will be rated at 50 watts each. Where garage, barn or other outhouse is occupied as living quarters, such rooms will be counted as a part of the residence and added to the residence count.

Payment.

The above rates are net rates, the gross rates being 10 per cent higher. In the event the current monthly bill is not paid within ten days from date of bill, the gross rates shall apply.

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Minimum Bill.

In consideration of the readiness of the Company to furnish such service, a monthly minimum charge equal to the total charge for the first 5 kilowatt hours will be made.

Service under this classification is subject to rules and regulations approved or prescribed by the Alabama Public Service Commission.

Effective for bills dated February 1, 1929 and thereafter.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

RE BATTLEFIELD AIRWAYS, INCORPORATED.

[Application Docket No. 19269.]

Monopoly and competition — Aviation.

The universal policy of the encouragement of aviation was held to be better subserved by the protection of existing air services in areas having a limited amount of business than the permission of unnecessary and destructive competition, in view of the fact that air development is usually the result of private enterprise.

[December 3, 1928.]

APPLICATION of an air utility for authority to conduct an air taxi and air carrier business; denied.

By the **Commission**: This proceeding is for approval of the incorporation of a proposed corporation to be known as "Battlefield Airways, Inc." for the purpose of "maintaining and operating a commercial flying service, and transporting freight, passengers, baggage, mail, and express by aircraft, and in connection therewith to purchase, lease, construct, equip, own, maintain, and operate landing fields and hangars and to do all things incidental to said business and pertaining thereto;" and also for approval of the beginning of the exercise of the right to transport by aircraft, passengers, baggage, freight, and express as a common carrier on call or demand from and to a flying field located in Cumberland township, Adams county, Pennsylvania.

It is protested by Gettysburg Flying Service Inc., a corporation of Pennsylvania, operating a commercial flying service from

its airport located in the same township as the applicants and approximately two and one-half miles distant therefrom.

The question presented for determination is, Shall the noncompetitive principle control under the facts in this case?

We are convinced from consideration of all of the facts and arguments that the applicant has failed to meet the legislative requirement to establish that the proposed service is necessary or proper for the service, accommodation, convenience, and safety of the public and so find and determine.

The Commission recognizes that the policy of the nation and state is to foster and encourage aviation. The facts in this case, however, are in the opinion of the Commission convincing that in a community such as Gettysburg the creation of unnecessary and destructive competition could not and would not be a contributing factor in the development of commercial flying service in Pennsylvania, but would be a decided hindrance to its development. Common carrier transportation by aircraft must be developed for some time at least by and through private enterprise which should not be required to struggle for an existence in the competitive field under conditions as existing in this case.

If, however, in any similar proceeding it appears that the application of the noncompetitive principle is not in the interest of and would not foster and encourage aviation, the principle will not control. This Commission desires in every way possible under its regulatory powers and duties to encourage the growth and development of commercial air service.

An order will issue refusing approval of the application. [Order omitted.]

WEST VIRGINIA PUBLIC SERVICE COMMISSION.

RE NEW-KANAWHA POWER COMPANY.

[Cases Nos. 1863, 1864.]

Water power — Commission jurisdiction.

1. The state was held to have delegated to the Commission by law its control and supervision over the development of water power from its streams, with authority to grant corporations organized under the

laws of the state for the purpose of engaging in such business, permits running for not more than fifty years, subject to the requirements of public convenience and necessity in such enterprise, p. 485.

Certificates — Burden of proof — Water power.

2. The burden of proof is upon an applicant for authority to exploit hydroelectric sites to show affirmatively that it is entitled to such permission, p. 486.

Water power — Qualifications of applicant.

3. The law requires that applicants for authority to construct and maintain power dams within the state shall not be granted except to a corporation organized for such purposes under the laws of the state, p. 486.

Water power — Commission duties — Safety of construction.

4. A Commission is particularly charged by the statute to refuse a permit for the building of any dam which is not so designed that it will be safe and secure beyond a reasonable doubt, p. 486.

Water power — Commission regulation — Economic aspect.

5. The Commission in determining the advisability of an application for authority to exploit hydroelectric sites within the state is required by statute to consider the general economic phases of the proposal, both as affecting the immediate consumers, the general public, other relative industries in the state, other natural resources, and commerce within the state generally, p. 487.

Monopoly and competition — Water power development — Economic phases.

6. A hydroelectric project was approved where the applicant for authority satisfied the Commission that a new market would be created to absorb the additional current to be generated, and that such development would in no way compete with coal mining or any other fundamental industry of the state, p. 487.

Water power — Property damage — Navigability of stream.

7. A hydroelectric project was approved where the applicant satisfied the Commission that no public inconvenience would result from the relocation of existing roads, bridges, railroads, or other utilities, and that the value of streams and rivers affected would not be impaired for future or other development of power or commerce, p. 491.

Water power — Public approval.

8. A hydroelectric project was approved where the Commission was convinced, in accordance with the requirements of the statute, that public sentiment in the territory affected was not opposed but rather favorable to the development, p. 492.

Water power — Conditions imposed by statute — Regulation by the state.

9. Permits for the exploitation of hydro power sites are subject by law to the limitation of regulation by the state of the distribution and sale of energy, the limitation as to the duration of the exercise of the permit, and for repossession by the state of all the rights, and provision for the purchase by the state of the property after a valuation

provided by law, and such other provisions as might be necessary to conserve and protect all public and private rights in the waters of the streams affected, and to promote the improvement of navigation and protect health, life, and property, p. 493.

Water power — Conditions to authority — Rate base.

10. A hydroelectric project was approved upon a condition warranted by the record and authorized by the general provisions of the statute providing the method of determining a valuation for rate-making purposes, p. 493.

Water power — Conditions — Construction.

11. A hydroelectric project was approved by the Commission upon a condition, warranted by the record and authorized by the general provisions of the statute, requiring the commencement of construction and prosecution of the work, p. 493.

Water power — General statutory conditions.

12. Approval was given to a hydroelectric project subject to general provisions of statute including a required agreement that the state by its proper authorities shall at all times have free exercise and power to regulate and control the distribution and sale of all current generated, as well as the construction, maintenance, and operation of the plant to the extent necessary to protect life, health, property, and navigation, p. 494.

Water power — Conditions — Reversion.

13. Permits to exploit hydroelectric sites were given in conformity with the statute providing that all rights thereunder should terminate in full control at the expiration of a 50-year period, and should revert to the state with full power and right to make such disposition thereof as should appear best, p. 494.

Water power — Recapture.

14. A permit was granted for the exploitation of certain hydroelectric sites providing that if at the expiration of the term thereof, such permit should not be renewed, and if the state should elect to operate such properties itself, the state should at any time after the expiration of such permit, upon at least one year's notice, acquire all properties necessary to the project at the actual value thereof to be determined by arbitration, p. 494.

Valuation — Recapture of water power plant — Arbitration.

15. A permit was granted for the exploitation of certain hydroelectric sites with the provision that should the state elect to recapture the site, the determination of the value thereof by the selected arbitrators should be considered the just compensation therefor with the express agreement that no allowance should be made for unreasonable costs of financing, promoters' profits, or for the value of said permit or grant of authority, or the value of any other franchise, right, or privilege granted by the state or any political subdivision thereof, and provided that no more should be paid for the property so acquired by the state than the sale and itemized cost thereof, p. 494.

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Water power — Conditions — Exclusions from rate base.

16. An agreement to exclude from future valuations for rate-making purposes, the value of permits, franchises, and privileges as well as unreasonable costs and profits, was required as a condition precedent to the granting of a permit for the exploitation of such sites, p. 495.

Water power — Conflict of construction with other utilities.

17. Authority granted to construct hydroelectric properties was so limited that the proposed works should not interfere with the maintenance and operation of railway lines, p. 496.

Contracts — Approval of hydro project by carrier.

18. A contract providing that any hydroelectric construction should be subject to the approval of a railway company, was held to be at variance with the provisions of the statute conferring complete control and jurisdiction over such matters to the Public Service Commission, p. 496.

[December 8, 1928.]

APPLICATION of a power company for authority to construct and operate a dam, hydroelectric plant, and tunnel; granted with certain provisions in accordance with opinion.

Appearances: Conley & Johnson, Charleston, (Clyde B. Johnson, appearing), Ben. G. Smith, New York, and Osenton & Lee, Fayetteville, for applicant; Captain J. T. Hatfield, Cincinnati, for Hatfield-Campbell Creek Coal Company; Fitzpatrick, Brown and Davis, Huntington, (H. S. King, appearing), for the Chesapeake & Ohio Railway Company; Ernest M. Merrill and George Sutherland, Charleston, for Great Kanawha Valley Improvement Association; Fred M. Livezey, Huntington, attorney for the Public Service Commission.

By the **Commission**: The New-Kanawha Power Company has made application in Case No. 1863 for authority to construct a dam in and across New River, 47 feet in height above normal low water, about one-quarter of a mile upstream from the Blue Hole tunnel of the Chesapeake & Ohio Railway Company, in Fayette county, and in connection therewith a hydroelectric plant on the right bank of New river about 1750 feet upstream from the railway bridge over said stream at Gauley Junction station, and a tunnel approximately 3,000 feet in length and about 25 feet in diameter connecting said dam and hydroelectric plant. This project is designated for convenience "Gauley Junction Dam." The area of the land that will be

flooded at high water is approximately 170 acres including the bed of the river, or approximately 85 acres exclusive of the land under the natural low water surface of the river. The applicant proposes to acquire in fee 830 acres of land, which include the land through which it proposes to acquire tunnel rights. It also plans to acquire flowage rights over approximately 95 acres including the bed of the river. The dam will impound 810,000,000 gallons of water, and will be capable of developing under the minimum flow of 1250 cubic feet per second 8,000 electric horsepower, and, under the largest flow for the utilization of which it would be economical to install generating equipment, considered to be 8,600 cubic feet per second, 50,000 electric horsepower. The annual average of power to be developed will be 36,000 electric horsepower. The proposed dam will be of a gravity, overflow type, with steel crest gates designed to control the water level upstream from the dam, and the materials to be used will be concrete for the substructure and fixed portions, and steel for the crest gates and operating machinery.

In Case No. 1864 the same company has made application for authority to construct a similar dam in and across New River, 36 feet in height, about four-fifths of a mile downstream from Hawks Nest station of the Chesapeake & Ohio Railway Company and approximately 700 feet downstream from the mouth of Turkey Creek, also in Fayette county, and in connection therewith a hydroelectric plant on the right bank of said river about 3 miles downstream from Hawks Nest station, and a tunnel approximately 3,900 feet in length and about 25 feet in diameter connecting the said dam and plant. This project is designated for convenience "Hawks Nest Dam," and is located immediately upstream from the pool created by the Gauley Junction Dam. The area of the land that will be flooded by this dam at high water is approximately 320 acres including the bed of the river, or 220 acres exclusive of the land under the natural low water surface of the river. It is proposed to acquire in fee 245 acres, which include part of the land through which it proposes to acquire tunnel rights. Such rights under an additional 225 acres will be required for this project. Flowage rights over approximately 340 acres will be required including the bed of

the river. This dam will impound 1,300,000,000 gallons of water, and will be capable of developing energy equal to that of the Gauley Junction Dam. The materials proposed to be used in this structure are similar to those to be used in the Gauley Junction Dam.

The applicant estimates the cost of the initial development of the two projects at $7,000,000, and the cost of the ultimate installation at $9,000,000.

Both applications were filed with the Public Service Commission on July 31, 1928, under the Water Power Act of 1915, and each of them contains the statutory agreement and stipulation upon the part of the applicant for itself, its successors, and assigns, "that the state of West Virginia, by its proper authority, shall at all times have and freely exercise the power to regulate and control the distribution and sale of all power generated under the permit granted by reason of this application, to the extent, at the election and discretion of the state by its proper authority, of requiring that such power shall be distributed, sold and used within the state of West Virginia," and the further agreement and stipulation that the state "shall at all times have and freely exercise the power to regulate and control the maintenance and operation of the dam constructed under such permit to such extent as may be necessary to prevent impairment of navigation."

In each case notice was given of the filing of the application in all respects as required by § 18 of the act. Leave was granted in both cases to any person interested to file objections to the applications or remonstrances against the undertakings proposed therein, and notice thereof was published at the direction of the Commission. No formal objections or remonstrances have been filed, although Captain J. T. Hatfield on behalf of the Hatfield-Campbell Creek Coal Company, a large shipper of coal on the Kanawha river, by way of a telegram dated August 20, 1928, protested against the granting of a permit in each case "until the transportation interests can make proper examinations for approval or disapproval." An order was entered August 21, 1928, fixing the 5th day of September, 1928, for hearing upon said applications at the Commission's hearing room in the Capi-

tol at the city of Charleston, and notice of the time and place of said hearings was given by the Commission to the parties of record.

Because of the similarity of the applications and all questions involved, the two applications have been heard together. They constitute the first proceeding brought under the Water Power Act for a major development of hydroelectric power in West Virginia.

Investigation and Hearings.

By authority of §§ 17, 20, and 22 of the act, the Commission on August 29, 1928, employed Mr. Charles E. Krebs, of Charleston, West Virginia, a reputable engineer of wide experience, and for years assistant state geologist, to make an examination of the locations, plans, drawings, and specifications of the structures proposed in these applications, and to report upon the same, such examination and report also to include the following matters:

(a) The safety and security of the proposed dams, and each of them.

(b) The effect of the construction of the said dams on any city, town or village.

(c) The economic advantage to the people of the state to accrue from the construction of the projects.

(d) The economic value to the people of the power to be made available as compared with the economic value and importance of agricultural lands, forests, coal, oil, gas, mineral deposits, and other natural resources likely to be submerged, damaged, destroyed, rendered inaccessible or more difficult of access, with consideration of such public inconvenience as may result from the removal and relocation of existing roads, bridges, railroads, and other public utilities, or the flooding of suitable routes for future roads, railroads or other means of transportation, and other changes to be made necessary by the development of the two power sites.

(e) The effect the granting of the proposed permits will have of destroying or greatly impairing the commercial value of the stream in which the dams are to be located, or any stream or streams affected thereby, giving consideration to navigation and future power developments on such streams.

A public hearing was held, pursuant to notice as hereinbefore mentioned, beginning September 5, 1928, and continuing on the following day. This hearing was largely attended because of the importance of the matter and the public interest therein, with formal appearances by the applicant, by the Chesapeake & Ohio Railway Company, which operates a line of railway along the New River, the Hatfield-Campbell Creek Coal Company, the Great Kanawha Valley Improvement Association, and by the attorney for the Public Service Commission. The applicant offered the testimony of Owen M. Jones, its engineer, who is well qualified in that profession and who has spent six years in an investigation of the power possibilities of the New River, Leonard H. Davis, its vice president and an engineer of experience, O. A. Knerr, president of the county court of Fayette county, James D. Boone, resident of Fayette county, James J. Riley, president of the Barium Reduction Corporation, South Charleston, S. P. Puffer, managing director of the Charleston Chamber of Commerce, Chester C. Counts, assistant engineer on the staff of the chief engineer of the Chesapeake & Ohio Railway Company, and Ernest M. Merrill, president of the Great Kanawha Valley Improvement Association. These witnesses testified in support of the applications. Ten exhibits were identified and filed, which, together with the testimony set out in the transcript of the shorthand reporters' notes and the general plans and drawings of the proposed dams, hydroelectric plants and tunnels and a statement of the character of materials to be used therein (filed as an exhibit with each petition), constitute the applicant's cases in chief.

The report of Mr. Krebs, the Commission's expert, on the matters and things hereinbefore set out in that respect, dated October 4, 1928, was filed by an order made October 10, 1928, and a further public hearing set for October 26, 1928, and adjourned to October 29, 1928, at which time Mr. Krebs was examined by the attorney for the Commission, Mr. Davis, vice president of the applicant, was cross-examined, Chester C. Counts testified at the instance of the Chesapeake & Ohio Railway Company, and the two cases were submitted for final determination.

In this connection, it may be noted that aside from the careful investigation made by Mr. Krebs at the instance of the Public Service Commission, the members of the Commission made a personal investigation of the sites and the stretches of the river involved in these proceedings. They went upon the ground accompanied by the engineers of the company and the Commission.

State's Authority Over Water Power.

The state's assertion of its authority as a sovereign over the latent power existing in the water in the streams within its borders was first made in 1913 when the legislature declared that "all water streams within the state capable of developing electrical or other energy or power shall be under the control and supervision of the state," subject only to the right of the riparian owner and the exercise thereof. Acts 1913, Chap. 11, § 1. That act was superseded by the Water Power Act of 1915, (Acts 1915, Chap. 17, Barnes' Code, Chap. 54B, 2 W. Va. P. S. C. 712), which declares the state's authority as follows:

"All water streams within the state capable of developing hydraulic, electrical, or other energy or power, shall be under the control and supervision of the state; *provided,* however, that nothing contained in this section shall deprive any riparian owner of any right or interfere with his exercise of the same."

[1] By this act the state's control and supervision over the development of power from its streams are delegated to the Public Service Commission, with authority to grant corporations organized under the laws of this state for the purpose of engaging in such business, permits, running for not more than fifty years, to construct, maintain, and operate dams for the development of hydraulic power and hydroelectric energy for sale to the public. The authority of the Commission to grant such permits is definitely limited by the several provisions of the law, as we shall hereinafter have occasion to set out; while its powers to investigate and determine all reasonable methods of the construction, equipment, maintenance, and operation of any dam and improvement for which a permit shall have been granted are confined only by the necessities required to "conserve and protect all public and private rights in any of the waters of the state,

promote the improvement of navigation, and protect life, health, and property."

[2] In these cases, as in all others before the Commission, the burden is upon the applicant to show affirmatively that it is entitled to the permission for which it makes application. The applicant has undertaken to carry that burden by offering the testimony of the witnesses hereinbefore named.

Applicant Must Be Local Corporation.

[3] The law provides that no permit to construct and maintain any power dam in any part of the bed or banks of a stream shall be granted except to a corporation organized for such purpose under the laws of this state. The applicant is such a corporation, having filed a copy of its certificate of incorporation and having satisfied the Commission by competent testimony of the regularity of its organization, the good faith of its organizers, and its ability to carry out the projects contemplated by its applications here.

Safety of Structures.

[4] The Commission is particularly charged by the statute to refuse a permit for the building of any dam which is not so designed that it will be safe and secure beyond a reasonable doubt. The legislative injunction on this point concludes with the strict mandate that the Commission "shall hold the safeguarding of life and property of the first importance and shall take abundant precaution against loss or disaster which might result from the failure of any such dam." The testimony of the applicant's engineers, as well as the report of the Commission's expert, is ample to satisfy the Commission on this point. Mr. Krebs has studied the general plans and drawings of the proposed dams and the applicant's statement of the character of the materials to be used therein; he has also examined the diamond core drillings made at the instance of the applicant at the proposed locations; and his familiarity with the geology of the basin in which it is proposed to construct the dams lends great weight to his conclusion, with that of the applicant's engineers, that the construction of the two dams and tunnels proposed by the appli-

cant, "if completed under the supervision of the Public Service Commission and its engineers and in the general plan and manner set forth by the applicant, would be safe beyond any reasonable doubt as to life and property." The Commission is satisfied from the evidence on this point that the general plans and drawings of these dams meet the requirements of the act in this respect, and will so find and enter of record.

The statutory requirement that an investigation be made to ascertain if the construction of such dams will injuriously affect any city, town or village, is fully met by the evidence (as well as the common knowledge) that there are no towns or villages along the stretches of New River affected in these cases. Towns and villages below the Gauley Junction Dam will not be injuriously affected if the conclusion is correct that the proposed dams will be safe and secure.

Economic Value of Project; Navigation.

[**5, 6**] Complying with another mandate of the statute, the Commission has investigated the question whether the construction of these dams will be economically advantageous to the people of this state, and whether the economic value of the power to be made available will be greater than the economic value and importance of agricultural lands, forests, coal, oil, mineral deposits, and other natural resources likely to be submerged, damaged, destroyed, rendered inaccessible or more difficult of access. In estimating and comparing such values, the Commission must consider such public inconvenience as may result from the removal and relocation of existing roads, bridges, railroads, and other public utilities, the flooding of suitable routes for future roads, railroads or other means of transportation, and any other changes made necessary by the development of the power sites. The investigation has also gone to the question of the effect the granting of the permits will have on the commercial value of the New river, or any other stream or streams affected thereby, including the Great Kanawha river which is formed by the junction of the New and Gauley below the proposed site of the Gauley Junction Dam, giving consideration to navigation as well as future power developments.

The evidence resulting from such examination is abundant, uncontradicted and convincing that the New river at the stretches involved in these cases is not a navigable stream; that the land is rough, stony, and steep and has no value for agricultural purposes; that no forest products of value exist and no coal is found of merchantable thickness; that no oil or gas has been discovered, and, should said minerals be found, there will be no difficulty in developing and recovering them by reason of the construction of the proposed dams; and that no other natural resources of commercial value have ever been found or known to exist at or near the site of the proposed dams or pools that will be created thereby.

Mr. Krebs' report traces the New river from its source in the Blue Ridge Mountains in Ashe county, North Carolina, through North Carolina and Virginia, a distance of about 200 miles to the West Virginia line at the southern boundary of Summers county, thence in a northwest direction for 89 miles to its junction with the Gauley river forming the Great Kanawha. The report states that the fall in New river from its source to Hinton, in Summers county, is 1650 feet, the fall from Hinton to Hawks Nest, a distance of 56.5 miles, is 538 feet, and from Hawks Nest to Gauley Bridge, 132 feet. The report describes the stream within this state as follows:

"New river cuts through East Mountain of the Allegheny system on the 'St. Clair Fault' near Narrows, Virginia, and penetrates through the Sewell and Gauley Mountains in West Virginia. From Sewell to Gauley Junction the river forms a narrow gorge, cutting the Pottsville Sandstones. These sandstones are hard conglomerate and do not erode easily, but form the cliffs that stand out boldly as walls on each side of the river. The topmost sandstone, that is, the Nuttall Sandstone, forms a series of layers with a thickness of about 400 feet, coming just over the Raleigh Sandstone with another thickness of about 400 feet, making in all more than 700 feet of almost continuous sandstones. The waters of New river have cut its channel through these sandstones in this gorge and formed narrow V shaped valleys with scarcely any bottom or level lands near the river, with large

boulders along its banks, and often with straight sandstone walls on its sides.

"The New river from Sewell to Gauley Junction was almost impassable until the Chesapeake & Ohio Railway was constructed. There is scarcely room for one track along its shore, so that very little double track has been laid by the railway, due to the fact that the cliffs do not even permit the construction of any highway on account of it being entirely too expensive. Through this gorge is the place the permit is sought to construct dams and tunnels by the New-Kanawha Power Company."

There is no evidence in these cases that there is a market for the annual average of 72,000 electric horsepower to be produced by these plants, or any part thereof, for power purposes, although the installation of equipment to generate 25,000 electric horsepower at each plant is contemplated at this time. The industries of southern West Virginia are already being satisfactorily supplied with electric power. Then, too, electricity is a competitor of coal; and hydroelectric generating plants are necessarily competitors of steam driven generating plants. Coal is the chief product of the southern section of the state and one of the chief products of the entire state. Millions of dollars are invested in the industry, and its preservation is an economic necessity. What, then, may be said of the economic advantage to the people of this state of authorizing the conversion of the latent energy of the waters of the New river at Hawks Nest and Gauley Junction into 50,000 horsepower of electric energy by plants to be operated twenty-four hours a day every day in the year, the initial cost of which is estimated at $7,000,000?

Mr. Leonard H. Davis, vice president of the applicant company, is also consulting engineer for the Electro Metallurgical Company, a subsidiary of the Union Carbide & Carbon Corporation. He testifies that the Electro Metallurgical Company operates a manufacturing plant at Glen Ferris, West Virginia, (a few miles below Gauley Junction) for the production of certain alloys known as chrome alloys, as well as very large plants elsewhere, the operations of all of which are founded on cheap hydroelectric power; that his companies contemplate a large expansion of their manufactories, a site for such expansion al-

ready having been acquired, a few miles below Gauley Junction; and that these manufactories will afford a regular and continuous market for the electric power to be produced by the New-Kanawha Power Company at the plants for which permits are sought. The Glen Ferris manufacturing plant is operated by electricity generated at a hydroelectric plant of the Electro Metallurgical Company at Kanawha Falls, and Mr. Davis' testimony is to the effect that that company can operate its proposed new plant only with a greatly increased supply of hydroelectric power. The cost of electric power generated at a steam plant would be prohibitive for the purposes of the manufactory, and besides, it requires the continuous source of power best supplied by a hydroelectric plant. Mr. Davis describes the plans of the applicant in this respect as follows: "It is expected that the greater portion of the power which is available at those two sites will be used in the industrial operations at the enlarged plants of the Electro Metallurgical Company. This power will be generated and sold by the New-Kanawha Power Company . . . to the Electro Metallurgical Company for the industrial purposes it desires to use it for. Any surplus power, it is proposed to sell through other distributing agencies." The witness was asked the following question about the construction of the proposed new manufacturing plant of the Electro Metallurgical Company: "Is there any chance it will be built if it is not furnished additional power that will be generated at these dams?" To which he replied, "No, the operations of the Electro Metallurgical Company are founded on cheap hydroelectric power. It is impossible to use at the present time steam power because it is altogether too expensive. Consequently, unless a source of cheap hydroelectric power can be found to operate its electric furnaces in this vicinity it will be impossible to build the plant."

The witness also described the proposed operation of the plant that is planned by the industrial company, saying, among other things, that the concern will "use as a result of this expected development upwards of 100,000 tons of coal [annually] either in the form of coal or coke, and a very large amount of limestone and silica rock."

It, therefore, appears that a new market will be afforded for

the power to be generated at these sites, and that the product of the proposed hydroelectric development will in no sense be sold in competition with coal or with power produced at coal consuming electric plants; and, further, that the hydroelectric development will indirectly increase the internal market for coal.

In this connection it is a matter of general public knowledge that the region of the upper Kanawha river is already the location of a large chemical manufacturing colony, attracted by the natural resources present there and by the present abundant supply of electric power, and dependent for its expansion upon the future possibilities of the region for increased power at low cost. It should be borne in mind that this applicant is a public service corporation subject in all respects to state regulation, and that the sale and distribution of its product will of necessity be made in conformity with the Public Service Commission Law.

[7] The testimony is that no public inconvenience will result from the relocation of existing roads, bridges, railroads, or other utilities, and that none will be required to be relocated except a small bridge and a short piece of county road at the mouth of Mill Creek leading from Hawks Nest to Ansted. To the relocation of the bridge the president of the county court of Fayette County testified there will be no objection, "if it will be done under the direction of the county engineer." No probable routes for future means of transportation will be flooded.

As hereinbefore stated, the evidence is clear, and it is a matter of general knowledge, that the New river is not navigable from its mouth to and including the upper reaches of the pool of the proposed Hawks Nest Dam. The testimony of Mr. Jones and Mr. Davis, both engineers, who have given careful study to the whole question, and the conclusions of Mr. Krebs, are also to the effect that the granting of the two permits sought in these proceedings will not impair the commercial value of the Great Kanawha river for navigation purposes; and the Commission will so find. Moreover, the applicant stipulates in each of its applications that the state "shall at all times have and freely exercise the power to regulate and control the maintenance and operation of the dam constructed under such permit to such extent as may be necessary to prevent impairment of navigation,"

and its vice president stated on the record that the applicant is not only willing to accept such limitation to its operations but desires that such a condition be made a part of any permit granted.

The evidence is likewise conclusive that the commercial value of neither the New river or the Great Kanawha river will be impaired for future or other development of power. It is true that one of these dams is to be 47 feet high and the other 36 feet. It would be practicable and safe to build a dam many times that height, were it not for the presence of the tracks of the Chesapeake & Ohio Railway Company in the New river canyon. The formations of the base and sides of the canyon are sufficiently substantial to support such a dam. The engineers are agreed, however, that the proposed dams are as high as they should be built to insure against every possibility of danger to the operation of the railway. The proposed tunnels will add greatly to the power capacity of the river without requiring dams whose height might endanger the operation of the railway. It has also been proven that the construction of two dams, rather than one, is necessary to an economic operation of the power sites; and it has been proven that the investment necessary to erect and maintain the proposed plants would not be warranted for a period of less than fifty years.

The Commission is, therefore, of opinion that the construction of a dam at Gauley Junction and a dam at Hawks Nest, as proposed by the applicant, will be economically advantageous to the people of this state.

Public Sentiment.

[8] Another requirement of the Water Power Act is that the Commission "shall have due regard for public sentiment in the district to be affected." These proceedings have been had after the fullest notice required by statute and the rules of practice and procedure, as well as wide newspaper publicity. The fact no remonstrances have been made by any person in Fayette county and that citizens and an official of that county have approved the projects on the witness stand, warrants the conclusion that

public sentiment in the district affected is favorable to the undertakings proposed.

Permits Granted.

The provisions of the statute having been complied with in all respects, the Commission is of opinion, in pursuance of the public policy adopted by the legislature in enacting the Water Power Act, to grant the applicant permits to construct the Gauley Junction and Hawks Nest Dams in conformity to the general plans and drawings filed with the separate applications herein and in accordance with such detailed plans, specifications, and drawings, to be filed by the applicant, as shall hereafter be approved by this Commission, and subject to the power, authority, and jurisdiction of the Commission to investigate, ascertain, and determine all reasonable methods of construction, equipment, maintenance and operation of said dams and improvements, and otherwise as provided by law, which said permits shall run for the term of fifty years with the restrictions, conditions, and reservations provided by law and warranted by the circumstances of these cases.

General Conditions and Limitations of Permits.

[9–11] The statutory conditions and limitations of a permit include (but are not limited to) the stipulation hereinbefore mentioned regarding the regulation by the state of the distribution and sale of energy; a provision limiting the duration of the exercise of the permit and for the repossession by the state of all the rights thereunder; a provision for purchase by the state of the property acquired, constructed, and maintained by the permittee and prescribing the method of determining the valuation thereof for such purchase; and such provision as may be necessary to conserve and protect all public and private rights in the waters of the streams affected by the permit, promote the improvement of navigation and protect life, health and property. Other conditions warranted by the record and authorized by the general provisions of the statute include, among others, a requirement for the commencement of construction and the prosecution of the work and a stipulation and agreement providing the method of determining a valuation for rate-making purposes.

Regulation of Sale of Energy; Protection to Navigation.

[12] The permits to be granted in these cases will, therefore, include the stipulation and agreement required by § 15 of the act and set out in the applications, that the state of West Virginia, by its proper authority, shall at all times have and freely exercise the power to regulate and control the distribution and sale of all power generated under each of the permits granted herein, to the extent, at the election and discretion of the state by its proper authority, of requiring that such power shall be distributed, sold, and used within the state of West Virginia, as well as the further stipulation and agreement set out in the applications and warranted by § 31 of the act, that the state of West Virginia, by its proper authority, shall at all times have and freely exercise the power to regulate and control the construction, maintenance, and operation of each of said dams, tunnels, and hydroelectric plants to such extent as may be necessary to prevent impairment to navigation on any stream affected thereby, and to protect life, health, and property.

Recapture and Valuation.

[13] Each permit will also provide, in conformity with § 32 of the act, that all rights thereunder shall terminate, and full control, occupancy, and enjoyment of the subject of such permit shall at the expiration of the period of fifty years from the date of its grant, revert to and revest in the state, and the people thereof, with full power and right to make such disposition thereof as to the state shall then appear best.

[14, 15] And each of said permits, in conformity to §§ 32, 35, and 34, will provide that if at the expiration thereof, the same shall not be renewed, and if the state should elect, either by itself or by another agency, to operate said power site, dam, and plant, the state may, at any time after fifty years from the date of the permit, upon at least one year's notice thereof, acquire all the property of the grantee acquired, constructed, or maintained, and used and useful in carrying out the purposes for which the permit, and any other rights, franchises, and privileges were granted, at the actual value thereof to be determined by

arbitration, one arbitrator to be selected by the Public Service Commission, one by the owner of the property, and, in case of disagreement, the two thus selected shall select a third, and the determination of the majority shall be considered the just compensation therefor, with the further stipulation and agreement that no allowance shall be made in said compensation for unreasonable costs of financing, for promoters' profits, for the value of the said permit or grant of authority to construct, maintain, and operate a dam in and across New river for the development of hydraulic power and hydroelectric energy by the use of the waters of said river, or for the value of any other franchise, right, or privilege granted by the state or any political subdivision thereof; *provided,* that no more shall be paid for the property so to be acquired by the state from said owner than the detailed and itemized cost thereof.

Valuation of Permit for Rate-Making.

[16] The legislature has definitely declared its purpose to prevent the capitalization of unreasonable costs of financing, promoters' profits, and of any increment in value of any rights granted a hydroelectric company by the state or any political subdivision thereof, upon the recapture of those rights. The courts have never questioned the legislative power to exclude such elements from valuations for rate making.

In view of the legal integrity of the intent of the legislature to exclude any allowance for the value of such permits, franchises, rights, and privileges, as well as said unreasonable costs and profits, such exclusion from any valuation for rate making under §§ 26 and 27 of the Water Power Act will be made a condition of the permits granted in these cases.

Construction to Begin Promptly.

It appears in the record that the applicant has expressed its intention to begin the construction of the proposed works without undue delay. A provision will, therefore, be embodied in the permits that the construction of said works shall be commenced within one year from the date of the acceptance of the permits, and be prosecuted with due diligence.

Rights of The Chesapeake and Ohio Railway.

[17, 18] The Chesapeake & Ohio Railway Company has asked that the permits granted herein shall provide for the protection of certain rights it has in lands that will have to be acquired by the applicant, and for certain conditions for the erection of any hydraulic works thereon, by virtue of an agreement between the owner of said lands and the railway company.

This request addresses itself to the authority to be granted the power company to acquire said lands or an interest therein. Such authority should be limited so that the construction, maintenance, and operation of the proposed works will not interfere with the maintenance and operation of the railway company's lines.

The provisions of the contract that any hydroelectric works shall be constructed subject to the approval of the railway company are at variance with the provisions of the statute which confer upon the Public Service Commission broad powers, authority, and jurisdiction over the detailed plans, specifications, and drawings for such construction and over the methods of construction, equipment, maintenance, and operation of any dam and improvement. The railway will thus under the statute be afforded immediate and complete protection from any damage accruing from such construction, maintenance, and operation.

Conclusion.

Separate orders may be prepared and entered in each of these cases, granting permits as outlined in this report and as otherwise provided by law, and in language suitable to the statute and necessary and proper under the facts in the cases; which permits shall not be effective unless, within ninety days after notice from the Commission that they have been granted, the grantee shall file with the Commission separate written acceptances of the same and of the terms and conditions thereof.